IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

TRUSTEES OF BOSTON UNIVERSITY,
Petitioner,

v.

JULIA PREWITT BROWN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

1. Whether, in a case in which the quality of a University tenure candidate's scholarship is in serious dispute but a judgment is entered for the tenure candidate in a Title VII action, a federal court should, without further inquiry, order the University to provide that candidate with lifetime tenure despite the University's constitutional right to determine who may teach.

2. Whether, in a civil case, a heightened standard of harmless error analysis is applicable to evidentiary errors which violate a University's constitutional rights.

LIST OF PARTIES

Trustees of Boston University is the beneficial owner of more than fifty percent of the issued and outstanding voting securities of Seragen, Inc. and Brite-Line Industries Incorporated, two Delaware corporations.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Trustees of Boston University ("Boston University" or "the University") hereby petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a) is reported at 891 F.2d 337 (1st Cir. 1989). The memorandum and order of the court of appeals denying the petition for rehearing (App., *infra*, 54a) is not reported. The district court's memorandum opinion on Title VII claims (App., *infra*, 66a) is reported at 674 F. Supp. 393, 394 (D. Mass. 1987) and the district court's judgment order (App., *infra*, 60a) is not reported.

JURISDICTION

The opinion of the court of appeals was entered on December 1, 1989. App., *infra*, 1a. The petition for rehearing was denied on January 24, 1990. App., *infra*, 54a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides, in relevant part, that:

> Congress shall make no law . . . abridging the freedom of speech . . . .

U.S. Const. amend. I.

Section 703 of Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified at 42 U.S.C. §§ 1981-2000h-6) provides, in relevant part, that:

> It shall be an unlawful employment practice for an employer—(i) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin . . . .

42 U.S.C. § 2000e-2(a)(1).

Section 706 of Title VII of the Civil Rights Act of 1964 provides, in relevant part, that:

> If the court finds that the respondent has intentionally engaged in . . . an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees with or without back pay . . . .

42 U.S.C. § 2000e-5(g).

Section 2111 of Title 28 of the United States Code, ch. 139, 63 Stat. 105, provides, in relevant part, that:

> On the hearing of any appeal . . . in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

28 U.S.C. § 2111.

STATEMENT

1. Petitioner Trustees of Boston University is a Massachusetts non-profit corporation responsible for the operation and control of Boston University, a private university located in Boston, Massachusetts. The University has approximately 19,500 full-time and 8,500 part-time students enrolled in its 14 schools and colleges. There are approximately 1,600 full-time and 800 part-time faculty members at the University. Among the most important responsibilities of the petitioner is the power to make a final decision to grant or deny tenure to a member of the faculty at the University. App., *infra*, 3a.

Respondent, an assistant professor in the English Department of the University's College of Liberal Arts ("CLA" or "College"), became eligible for tenure during the 1979-80 academic year. App., *infra*, 4a. An award of tenure is usually granted only after six years of teaching and depends upon an evaluation of the tenure candidate's scholarship, teaching and service to the University. At the time of her tenure review, in her sixth year of teaching, respondent had published one book, a revision of her doctoral dissertation on Jane Austen, and three book reviews. *Id.*

At the outset of the tenure review process, respondent was recommended for tenure by her department's tenured faculty and by the College's Appointments, Promotions and Tenure Committee ("APT"). App., *infra*, 4a-5a. The Dean of the College, however, expressed significant reservations concerning the quality of respond-

ent's scholarship, citing negative evaluations of her book in several scholarly reviews and the criticisms of her work by a peer reviewer from outside the University. App., *infra*, 5a-6a.[1] The Dean nevertheless conditionally recommended tenure, but specified that if subsequent reviewers concurred in his "reservations" regarding respondent's scholarship, then respondent should be offered a three-year extension of her probationary period in which her pending project, a proposed book on Oscar Wilde, could be completed and reviewed.

At the next stage of the process, the University-wide APT committee, by a vote of 9-2, recommended that respondent receive tenure. App., *infra*, 6a-7a. That committee, although generally laudatory of respondent, noted that the "reviewers as well as the scholars that were consulted by [the Dean of CLA] have called attention to some weaknesses in [respondent's] study of Jane Austen." C.A. App. 646.[2] The next review, by the Assistant University Provost, likewise "expressed concern about the quality of [respondent's] book" and recommended that respondent be granted a three year extension of time to complete additional scholarship. App., *infra*, 7a. The Assistant Provost stated:

> [Respondent's] publishing achievements are limited in quantity to a revised dissertation and three book reviews. . . . The three year extension will enable her to finish this major *independent* work [the Oscar Wilde book], and prove whether she is able to sustain and improve the quality of her work as a maturing humanist.

Id. (emphasis in original). The University Provost agreed with this assessment and advised respondent that

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[1] The Dean stated that respondent's teaching was "fine" but also expressed reservations regarding her service to the University, particularly the fact that "she did not spend enough time advising students." App., *infra*, 6a.

[2] Citations to the joint appendix in the court of appeals are cited as "C.A. App."

he would recommend to the University President that she be given a three year extension of her probationary period. The University Provost further advised respondent that if she accepted the three year extension he would recommend an immediate promotion to Associate Professor. *Id.*; C.A. App. 656.

The grant of such an extension of the probationary period required not only the Administration's recommendation but also the concurrence of respondent, as well as the College's English Department, the College APT, and the University APT. App., *infra*, 7a. Respondent however, refused this offer outright, and wrote the University Provost that she would "not accept the recommendation of a three year extension." App., *infra*, 8a. In response, the Provost informed respondent that he would recommend denial of tenure to the University President, and he thereafter did so, explaining:

> [Respondent] has accomplished relatively little since her appointment at Boston University. While her book on Jane Austen was well-received, it is basically a revision of her dissertation. . . . [Respondent] does not possess the scholarly record which would justify tenure at this point in time and . . . her service and teaching are not outstanding enough to compensate for this deficiency.

C.A. App. 670.

Because the recommendations had not been uniform, see app., *infra*, 8a, under the established tenure review procedures an ad hoc Tenure Review Committee ("TRC") of three impartial professors from outside the University who were "acknowledged authorities in the [respondent's] field" was asked to review respondent's qualifications for tenure. The TRC reviewed respondent's tenure dossier and respondent presented her case, in writing, to the Committee. The TRC voted, 2-1, to recommend tenure, but all members of the committee expressed "reservations" about her scholarship. C.A. App. 681. The Committee's report stated that the Committee

> found [respondent's book on Jane Austen] to be . . . marred by a somewhat misleading initial focus, readings that sometimes seemed arbitrary and occasionally misleading, and an unsure sense on [respondent's] part of the critical and scholarly context. . . . We found it hard to judge [respondent's] prospectus on Wilde because at this stage it seems only a plan.

C.A. App. 681-82. Although the Committee believed that respondent "was capable of excellent original thinking," the Committee report stated that "[w]e all regretted that we had no further work on which to judge [respondent]; one committee member felt that such a lack of evidence of wider commitment was crucial. . . ." App., *infra*, 9a.

One member of the TRC majority separately noted that the historical discussion in respondent's book was "(1) thin and (2) largely delivered within a polemical context that no longer seems important." C.A. App. 683-84. The dissenting member, in a separate statement, concluded that "[w]hen I consider that in the five years beyond her doctorate, . . . [respondent] produced only this one book (I do not take occasional book reviews seriously . . .), and that this one book was a revision of her doctoral dissertation, it seems to me that future uncertainties outweigh future possibilities." C.A. App. 685.

Upon receipt of the TRC Report, the Provost reported to the President of the University that the "report does not give a strong, unqualified endorsement of the candidate's work. Rather it confirms my earlier judgment that [respondent] has not yet established a sufficiently strong scholarly record to merit tenure at Boston University." *Id.* The President thereafter recommended to the Trustees that tenure not be granted and the Trustees denied respondent tenure. App., *infra*, 10a.[3]

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[3] On April 17, 1981, the President of the University wrote respondent that the University Trustees had approved the decision to deny her tenure and that the 1981-82 academic year would be

The President of the University explained that the determination to award tenure involves a "very complex" decisionmaking process that takes into account not only the highest standards of scholarship, teaching and service but also the University's financial stability and its needs. C.A. App. 454-64. Such an award typically binds the University for a period of 40 years and involves a financial commitment of about $2 million. *Id.* Thus, tenure review is predicated on "a presumption that tenure should not be awarded" and tenure is not granted "[i]f there is any doubt about it." C.A. App. 462-64. The President stated that, in this case, the three year extension would have provided an "ideal" opportunity for a "promising scholar . . . to demonstrate that level of maturity that had not yet been shown." C.A. App. 465-66, 473-76.

Under the established tenure review procedures, the three year extension was given only "in occasional cases of substantial merit where a faculty member is potentially tenurable, but where further scholarly work is expected to be completed in short order." C.A. App. 756. The relevant history of this provision demonstrates that no other candidate ever rejected the offer of a three year extension, that such offers were made to male and female candidates both in the Department of English and the CLA as a whole, and that male and female faculty overwhelmingly received tenure at the completion of the three year extension.[4] However, when respondent

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the terminal year of her appointment. Before the 1981-82 academic year began, and even though she could have taught for another year, respondent precipitately resigned from the University. C.A. App. 692-93.

[4] Respondent is the only tenure candidate to have rejected a three year extension of the probationary period in CLA. C.A. App. 443-44. Respondent was one of five candidates from the English Department who was reviewed for tenure between 1979 and 1985. Of the four other candidates, only one, a woman, received tenure as a result of an initial tenure review; the other three, two men and a woman, were offered three-year extensions. Each of these candi-

rejected that option, the substantial criticism of the Austen book coupled with the absence of any progress on the new book—even though respondent had been given a full year's leave of absence to complete that project—confirmed the assessment that respondent's professional development had not reached the point where an award of tenure was appropriate. C.A. App. 477-491, 612-34.[5]

2. Respondent filed suit in the Massachusetts Superior Court alleging that the University wrongfully denied her tenure because of her sex. App., *infra*, 10a. According to respondent, such action violated a collective bargaining agreement between the University and a faculty bargaining representative. *Id.*[6] Boston University removed the case to the United States District Court for the District of Massachusetts, alleging jurisdiction under Section 301(a) of the Labor Management Relations Act of 1947, ch. 120 § 1, 61 Stat. 136 (codified at 29 U.S.C. §§ 141-188), 29 U.S.C. § 185(a). Respondent thereafter amended her complaint to include claims that the University had denied her tenure based on her sex, in violation of Title VII of the Civil Rights Act of 1964 and the

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dates received tenure when reviewed a second time. C.A. App. 261-62, 283-84, 304, 306-07, 358, 492-95, 749-50.

[5] Not only was respondent given leave from the University during the academic year 1979-80 to enable her to work on her Oscar Wilde project, she was given additional leave during 1980-81. According to respondent's testimony at trial, she requested leave for the second semester of 1980-81 "to give her the opportunity to do some work" on the Wilde project. Respondent acknowledged in her trial testimony, however, that she never submitted a Wilde manuscript, much less a Wilde book, to the University. Respondent also admitted at trial that she had not completed even a partial draft of the Wilde book during 1980-81 and that as of April 12, 1982, she still had not written the book's first draft. C.A. App. 193-98.

[6] The breach of contract claim alleged, in part, that petitioners had violated the agreement by discriminating against her based on her sex. Respondent also alleged that the University discriminated against her based on her participation in a strike against the University. The jury found that respondent was not discriminated against based on her strike activity, and respondent did not appeal.

Massachusetts Fair Employment Practices Law, ch. 368 § 4, St. 1946, Mass. Gen. Law. ch. 151B § 4.

Respondent's claim alleging a breach of the collective bargaining agreement on the basis of sex discrimination was tried to a jury; the Title VII and state law discrimination claims were simultaneously tried to the court. Many of the district court's rulings—and particularly its charge to the jury—were made, however, as though the jury were considering the Title VII action. Moreover, the court held that the jury's findings with respect to respondent's claim that she had been denied tenure because of her sex (in violation of the contract) would be determinative of the University's liability under Title VII.

At trial, respondent presented the jury with evidence intended to demonstrate the strength of her qualifications for tenure.[7] Respondent, over the University's strenuous

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[7] Respondent relied in substantial part on the testimony of two colleagues, Professors Goodheart and Craddock, who, over the University's objections, were permitted to state opinions regarding respondent's reputation outside the University and the quality of her book on Austen—opinions which, of course, were not before the University when it made its tenure decision. C.A. App. 219-225, 297-302. The First Circuit found that this testimony had no relevance but nonetheless found "no harm" and "no material prejudice" to the University from the improper admission of this testimony. App., *infra*, 21a-22a.

The District Court also admitted certain statements made by the University President in which he referred to the English Department as a "damn matriarchy" and assured another tenure candidate that she need not worry about tenure, stating "and anyway, I never worried about job security, and your husband is a parachute, so why are you worried[?]". App., *infra*, 23a. The University argued that this evidence was irrelevant before the district court and the Court of Appeals, noting that neither comment related to respondent, that they were made *after* the decision denying respondent tenure, and that the candidate then in question received tenure with the University President's approval. The Court of Appeals recognized that these comments "were far weaker" evidence of a discriminatory attitude than presented in any case relied upon by

objection, was also permitted to adduce certain evidence which purported to support her claim of discrimination by showing an "atmosphere" of sex discrimination at the University.

First, respondent presented evidence of a Freedoms Foundation Symposium speech given in Washington, D.C. by the University President in 1984 (some three years after respondent was denied tenure) in which he discussed the relationship between the decline of traditional family roles and education. He stated that

> the proportion of children who do not have even one parent at home during the day—has increased sharply. . . . [T]he number of working wives—as opposed to working mothers with children under 18—rose from 26 percent to 46 percent. Lack of parental supervision associated with both parents working explains in part that children typically watch 24 hours of television a week.

App., *infra*, 26a-27a. Respondent was permitted to present those statements and other selected portions of the speech to the jury and to argue, in closing, that the

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respondent and that it took "a tremendous leap to infer from remarks such as these" that the University President denied respondent tenure because of her gender, app., *infra*, 25a, but nonetheless concluded that the district court did not abuse its discretion in admitting this evidence. App., *infra*, 24a.

The district court excluded the University's proffered testimony of Professor Clarke, the chairman of the College APT, who would have explained that he and other members of the committee were influenced to vote in favor of tenure based on the erroneous belief that respondent's book on Oscar Wilde was "forthcoming." App., *infra*, 20a. The First Circuit concluded that Professor Clarke "probably should have been permitted to testify" because his testimony would have supported the judgments of the University President and the Assistant Provost that tenure should have been postponed pending assessment of respondent's work on the Wilde book. App., *infra*, 20a-21a. However, the court again offered the cursory conclusion that the error did not prejudice the University. App., *infra*, 21a.

speech demonstrated the President's antiquated view of working women and thereby suggested his motive for denying tenure to respondent. App., *infra*, 27a; see C.A. App. 531.[8]

Second, respondent was allowed to introduce evidence that the Dean of the College of Liberal Arts had not provided the full amount of funding sought for a Women's Studies Program as circumstantial evidence of discriminatory animus towards women. App., *infra*, 28a-29a.[9] Respondent used this evidence of a University's curriculum decision to argue that the Dean of CLA's reservations about the quality of respondent's scholarship merely reflected his dislike for feminist scholarship in general.

The jury found in favor of respondent and the district court upheld the award of $200,000 on the contract claim. The district court also imposed an additional award of $15,000 for emotional distress under the state law claim. With respect to the Title VII claim, the court ordered the University to reinstate respondent and to award her

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[8] At the time respondent was considered for tenure, the University President had recommended for tenure three of the seven women professors who had received tenure in the CLA English Department. Of the eighteen tenured male professors in the CLA English Department, the University President had recommended only five. C.A. App., 496-98. The University President had also approved the promotion of Professor Patricia Craddock and her appointment as Chairman of the CLA English Department. C.A. App., 354-57.

[9] In fact, the program was approved and offered as a minor program in the College of Liberal Arts. Nevertheless, the jury was instructed that evidence that the program received less than the full funding sought by its proponents could be considered

> to the extent that it shows evidence of a disdain on the part of the administration or disapproval of Women's Studies, and you may consider that to the extent that you think that it is relevant or dispositive in determining whether there was any sexual discrimination . . . in the denial of tenure . . . .

C.A. App., 389-90.

tenure.[10] Finally, the court awarded respondent her attorneys' fees and expenses.

3. The court of appeals affirmed. On appeal, petitioner argued that the evidence relating to the President's symposium speech and the Women's Studies Program was irrelevant and highly prejudicial. Petitioner also argued that the admission of such evidence presented a risk of chilling scholarly and academic speech. The First Circuit agreed in both instances but nonetheless affirmed.

The First Circuit held that it would "not sustain the [district] court's admission" of the University President's speech as evidence of an atmosphere of sex discrimination at the University. App., *infra*, 26a. The court reviewed the attenuated chain of relevance that respondent had asserted before the district court:

> [respondent] asserts that this speech was relevant to show [the University President's] view of working women, possibly explaining his motive in denying [respondent] tenure . . . .

App., *infra*, 27a. The court rejected that line of reasoning, concluding that "[i]t is an untenable leap" from the text of that speech about the widely recognized "social problem" of child care "to the inference that the author would deliberately deny tenure to a qualified faculty member." *Id.*[11] The court found that the "rele-

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[10] In its opinion granting tenure to respondent, the district court denied respondent's other requests for relief, including "immediate promotion to full professor, a year's paid sabbatical . . . upon reinstatement, additional payments into her pension fund [and] continued supervision and posting." App., *infra*, 69a-70a.

[11] The theme of the President's speech was that society had a responsibility to provide an alternative child nurturing system for children whose parents are working. C.A. App. 520-521. Respondent, however, used excerpts from the speech to imply that the President harbored a hidden sexist agenda (*i.e.*, impeding women's progress in the workforce) that manifested itself in the denial of tenure to respondent.

vance" of such evidence "if not quite zero, is close to that." *Id.*

The court also recognized the detrimental effect on "academic freedom" that resulted from admitting evidence of the President's academic commentary:

> While one would hope that jurors would see them for what they are, there is the danger such red-herrings, skillfully manipulated, could cause a jury to stray. We fear, moreover, the chilling effect that admission of such remarks could have on academic freedom. Use of such evidence . . . could cause a university president, dean or teacher to avoid topics of this kind altogether for fear that one or two sentences might later be used as evidence of alleged discriminatory animus.

Id. However, while the court recognized that "[i]t was error to admit these remarks," the court concluded that it was harmless error: "we think it highly unlikely that these remarks . . . had an effect on the outcome." App., *infra*, 27a-28a. Therefore—despite the fact that the evidence was important enough for respondent to emphasize it in closing argument—the First Circuit concluded that "the improper admission of this evidence" was not "prejudicial error." App., *infra*, 28a.

For the same reasons, the First Circuit also found that the trial court erred in admitting evidence about the Women's Studies Program. The court of appeals again stated that "the admission of this kind of evidence"—which is "totally removed" from the subject of the case—infringed upon academic freedom. App., *infra*, 29a. The Court concluded that the Dean of CLA, like any other scholar, "should not have to fear that he cannot express his opinion as to the *quality* of a particular studies program without this criticism being brought forward as evidence" against him in a jury trial. *Id.* (emphasis added). Yet, despite the infringement of First Amendment-protected interests, the court again

refused to reverse, stating that it was "not persuaded that the outcome was affected by the admission of this evidence." *Id.*[12]

With respect to the remedy, the University argued that a judicially imposed award of tenure "is a significantly more intrusive remedy than remedies ordinarily awarded in Title VII cases, such as reinstatement or seniority, because a judicial tenure award mandates a lifetime relationship between the University and the professor." App., *infra*, 47a. The University also argued that

> due to the intrusiveness of tenure awards and the First Amendment interest in academic freedom, a court should not award tenure unless there is no dispute as to a professor's qualifications.

Id. Because there was such a dispute in this case, the University argued that the remedy of lifetime tenure was inappropriate.

The court of appeals conceded that it should be "extremely wary" of intruding "into the world of university tenure decisions." App., *infra*, 48a. Nevertheless, the court held that academic freedom only conferred upon the university the right "to determine for itself *on academic grounds* who may teach . . . ." *Id.* (emphasis in original) (quoting *Sweezy* v. *New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring)). That First Amendment right was not implicated in awarding respondent tenure, according to the First Circuit, because the jury's finding of sex discrimination meant that the University's decision "who may teach" was tainted by

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[12] In sum, the court of appeals ultimately concluded that the cumulative effect of all of these errors—the improper admission of testimony from Professors Craddock and Goodheart, *supra*, note 7, the "probably" improper exclusion of Professor Clarke's testimony, *supra*, note 7, the improper admission of the President's speech and improper admission of evidence concerning the Women's Studies Program—were "harmless." App., *infra*, 54a-55a.

non-academic grounds: "[w]hile we have been and remain hesitant to interfere with universities' independent judgment in choosing their faculty, we have said that we will respect universities' judgment only 'so long as they do not discriminate.'" App., *infra*, 49a (quoting *Kumar* v. *Board of Trustees*, 774 F.2d 1, 12 (1st Cir. 1985), *cert. denied*, 475 U.S. 1097 (1986)).

Thus, the court rejected the suggestion that the unique characteristics of academic tenure "counsel imposition of less restrictive alternative remedies" than an award of a lifetime teaching contract, at least where the qualifications for tenure are in dispute. *Id.* According to the First Circuit, once liability is established the federal interest in "provid[ing] . . . the most complete relief possible" outweighs any academic freedom interest:

> [T]o deny tenure because of the intrusiveness of the remedy and because of the University's interest in making its own tenure decisions would frustrate Title VII's purpose of 'making persons whole for injuries suffered through past discrimination.'

App., *infra*, 50a (citation omitted). The "district court's order that Boston University reinstate [respondent] as an associate professor with tenure" accordingly was affirmed. App., *infra*, 52a.

REASONS FOR GRANTING THE PETITION

Certiorari should be granted in this case for two reasons. First, the decision below creates a conflict with the Sixth Circuit concerning the appropriateness of awarding lifetime academic tenure by judicial fiat where there is a finding of discrimination in the tenure decisionmaking process but the plaintiff's qualifications nevertheless are subject to legitimate dispute. In the Sixth Circuit, a successful Title VII plaintiff is entitled to an award of reinstatement with tenure only in the "exceptional circumstances" where the court is convinced that the

plaintiff cannot and will not receive fair reconsideration by the college or university. In the First Circuit, however, plaintiffs who successfully challenge a tenure decision under Title VII are automatically entitled to a judicial award of tenure—*i.e.*, a guarantee of lifetime employment—regardless of whether a less intrusive remedy would provide full relief and regardless of any legitimate dispute over the plaintiffs' qualifications. Review of the First Circuit's holding therefore is necessary to establish a uniform federal standard on this legal issue of vital importance to this nation's colleges and universities.

Second, a separate First Amendment issue is raised by the district court's erroneous admission into evidence of certain scholarly commentary and curriculum decisions for the purpose of supporting "inferences" of discriminatory animus allegedly derived from that speech. Although the court of appeals recognized that such an abuse of academic speech and curriculum decisions could have a "chilling effect . . . on academic freedom," it excused these errors with the cursory conclusion that they were not likely to have affected the verdict. Such a holding squarely presents an important question of federal law left open by this Court's prior decisions: whether the heightened standard for determining whether constitutional error is harmless in a criminal trial—*i.e.*, "harmless beyond a reasonable doubt"—should be applied in the civil context. In sum, the petition presents two separate and distinct issues involving the tension between the right of academic freedom protected by the First Amendment and the important state interest in adjudicating claims of discrimination under Title VII.

I.

A. The decision of the First Circuit below is in flat conflict with decisions in the Sixth Circuit holding that an award of tenure should not automatically be imposed by judicial mandate despite a finding of discrimination

in the tenure review process so long as academic qualifications are fairly in dispute. In *Gutzwiller* v. *Fenik*, 860 F.2d 1317 (6th Cir. 1988), the Sixth Circuit articulated certain controlling principles to guide district courts in determining the appropriate equitable relief in Title VII cases involving discrimination in a university's tenure decisionmaking. According to the court, "in most [university] cases" an award of reinstatement *with* tenure would "entangle the courts in matters best left to academic professionals." 860 F.2d at 1333. Therefore, a judicial award of tenure

> should be provided in *only the most exceptional* cases. Only when the court is convinced that a plaintiff reinstated to her former faculty position could not receive fair reconsideration (*i.e.* consideration without the taint of discrimination) of her tenure application should [the court] order reinstatement with tenure.

Id. (emphasis added).[13] Thus, despite a factual record virtually identical to the record in this case, the Sixth

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[13] In a separate opinion, Chief Judge Wellford would have gone even further in limiting the discretion of trial courts in fashioning equitable relief under Title VII, arguing that courts should *never* award tenure. Judge Wellford reasoned that because tenure decisions "often involve inquiry into aspects of arcane scholarship beyond the competence of individual judges," courts should not act as "super tenure review committees" by substituting their judgment "for that of the college with respect to qualifications of faculty members for promotion and tenure." 860 F.2d at 1341. This view has been echoed in other federal courts. See *Zahorik* v. *Cornell University*, 729 F.2d 85, 93 (2d Cir. 1984) ("Where the tenure file contains the conflicting views of specialized scholars, triers of fact cannot hope to master the academic field sufficiently to review the merits of such views and resolve the differences of scholarly opinion."); *Namenwirth* v. *Board of Regents*, 769 F.2d 1235, 1242-43 (7th Cir. 1985), *cert. denied*, 474 U.S. 1061 (1986) ("Mere qualification depends on objective measures—the terminal degree, the number of publications, and so on. *Tenure requires something more*; it requires that the department believe that the candidate have a certain amount of promise. . . . Tenure decisions have al-

Circuit in *Gutzwiller* remanded for consideration of the appropriate remedy because it was "unable to make [a] determination [as to the likelihood that plaintiff would receive "fair reconsideration"] at this stage of the case." *Id.*[14]

The Sixth Circuit subsequently applied the principles announced in *Gutzwiller* to reverse a district court's order awarding tenure to a successful Title VII plaintiff in *Ford* v. *Nicks*, 866 F.2d 865, 877 (6th Cir. 1989).[15] In *Ford*, a different panel of the Sixth Circuit affirmed a district court's finding that the plain-

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ways relied primarily on judgments about academic potential, and there is no algorithm for producing those judgments. Given the similar research output of two candidates, an experienced faculty committee might—quite rightly—come to different conclusions about the potential of the candidates.") (emphasis added).

[14] The Sixth Circuit noted plaintiff's argument—which echoes the complaints of respondent in this case—that

> no male member of the Department had ever been advised that he should publish a second book, independent of his dissertation, before he would be considered for tenure. Further, the evidence showed that [plaintiff] met or exceeded the number of publications of every tenured faculty member [except one].

Id. at 1326. Despite this evidence of discrimination, the Sixth Circuit held that it would be improper to *order* the University to grant plaintiff tenure *unless* it was established that it would be impossible for the university to provide an unbiased tenure review for plaintiff. By contrast, the First Circuit, faced with much the same evidence rejected the proposal that the University be ordered to provide a "non-discriminatory tenure decision." App., *infra*, 49a.

[15] The Sixth Circuit's opinions in *Gutzwiller* and *Ford*, both of which were decided after briefs were filed before the First Circuit in this case, belies the First Circuit's statement that "[t]here are no cases, however, *denying* an award of tenure to a professor who has been found to be the victim of a discriminatory tenure decision." App., *infra*, 47a n.21. Moreover, an award of tenure has been affirmed in only two reported cases where, unlike here, the plaintiff's qualifications for tenure were not in dispute. *Ford* v. *Nicks*, 741 F.2d 858 (6th Cir. 1984), *cert. denied*, 469 U.S. 1216 (1985); *Kunda* v. *Muhlenberg College*, 621 F.2d 532 (3d Cir. 1980).

tiff had been discriminated against by the University because of her sex; indeed, the court held that the evidence in the record clearly supported a finding that the University's proffered justifications for refusing to rehire the plaintiff were pretextual. *Id.* at 871-73. However, the Sixth Circuit held that there was no evidence to suggest that this was an "exceptional case" where it would be impossible for plaintiff to receive a fair tenure review from the university. *Id.* at 877. The Sixth Circuit therefore concluded that the district court erred in imposing an award of tenure as a matter of equitable relief under Title VII—rather than simply ordering fair reconsideration of the plaintiff by the university in the established tenure review process. *Id.*

The First Circuit, by contrast, has specifically rejected the option of ordering "fair reconsideration" as mandated by the Sixth Circuit in *Gutzwiller* and *Ford.* App., *infra*, 49a. Instead, the First Circuit has held that an award of tenure is presumptively correct because "[a]warding [a successful Title VII complainant] tenure is the *only* way to provide her the most complete relief possible." App., *infra*, 49a (emphasis added). Therefore it is clear that if the instant controversy had arisen at Vanderbilt University or at the Ohio State University, application of the Sixth Circuit rule would have resulted in the reversal of the district court's award of tenure to respondent.[16] The petition should be granted to resolve

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[16] Indeed, the district court opinion below awarding respondent tenure makes clear that this was not an "exceptional case" in which a non-discriminatory award of tenure was impossible. App., *infra*, 68a (distinguishing *Fields* v. *Clark University*, No. 80-1011-S (D. Mass. Mar. 14, 1986) (1986 WL 5350), *rev'd on other grounds*, 817 F.2d 931 (1st Cir. 1987)). In *Fields*, the district court found "strong evidence of a pervasively sexist attitude on the part of the male members of the sociology department, the same people who made the basic decision to deny [plaintiff] tenure." 1986 WL 5350 at 2. Yet, the district court held that plaintiff was entitled only to a fair reconsideration, despite the fact that such an order placed

this conflict and provide essential uniformity in the law governing Title VII remedies in the academic context.

B. The rule adopted by the Court of Appeals also unquestionably infringes the University's First Amendment right "to determine for itself on academic grounds who may teach." *Sweezy* v. *New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J. with Harlan, J., concurring in the result). Such a rule automatically "*substitute*[*s*] [a district court's] teaching employment criteria for those already in place at the academic institutions" and therefore "directly and completely usurp[s] the discretion of [an] institution." *University of Pennsylvania* v. *E.E.O.C.*, 110 S.Ct. 577, 587 (1990) (emphasis in original). Because the First Circuit's rule, which mandates a judicial award of lifetime tenure, gives no weight to First Amendment protected academic freedom and is therefore not narrowly tailored to serve any compelling governmental interests, *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829, 841-42 (1978), *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 786, 793-95 (1978), it is inconsistent with previous decisions of this Court and therefore warrants review.

This Court previously has recognized, in a variety of settings, the fundamental importance of academic freedom and the resulting need to protect it under the First Amendment from unwarranted governmental interference. For example, in shielding the political beliefs of a university professor from official inquiry in *Sweezy* v. *New Hampshire*, the Court emphasized that "[t]he es-

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"plaintiff's career in the hands of some of the same people who dealt with it [improperly] before." *Id.* at 3. Such a result was acceptable to the court because it noted that "there have been additional appointments of women to the faculty, and there undoubtedly is a very significant general increase in the acceptance of and respect for women in the learned professions." *Id.* Here, the district court had even stronger evidence regarding "additional appointments of women to the faculty" and "respect for women" at Boston University. *See supra*, notes 4 & 8.

sentiality of freedom in the community of American universities is almost self-evident . . . . To impose any straight jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation." *Id.* at 250. Justice Frankfurter, joined by Justice Harlan, underscored the need for the "exclusion of governmental intervention in the intellectual life of a university." *Id.* at 262. In particular, Justice Frankfurter identified the "four essential freedoms" of a university—*i.e.*, the freedom to determine "who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Id.* at 263.

In *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967), the Court explained that: "[o]ur Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom." 385 U.S. at 603. The Court went on to emphasize the importance of academic autonomy in deciding "who may teach," stating that "[t]he Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritarian selection.'" *Id.* (quoting *United States* v. *Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)); see *Regents of University of Michigan* v. *Ewing*, 474 U.S. 214, 225 (1985) ("judges . . . asked to review the substance of a genuinely academic decision . . . should show great respect for the faculty's professional judgment"); Byrne, *Academic Freedom: A "Special Concern of the First Amendment,"* 99 Yale L.J. 251, 312 (1989) ("Significant changes in the social function of the university and in its legal status, furthermore, have necessitated some constitutional protection of the university's essential decision-making.").

More recently, in *University of Pennsylvania* v. *E.E.O.C.*, 110 S. Ct. 577 (1990), the Court noted that it had not "define[d] today the precise contours of any academic-freedom right against governmental attempts to influence the content of academic speech through the selection of faculty . . . ." *Id.* at 586. Nevertheless, although the Court rejected the University's request for "an *expanded* right of academic freedom to protect confidential peer review materials from disclosure," the Court again "stressed the importance of avoiding second-guessing of legitimate academic judgments." *Id.* at 587.

This case directly poses one issue left open by the Court in *University of Pennsylvania.* The remedial rule adopted by the First Circuit unquestionably and directly assumes judicial authority to define the future direction of academic life at the University by ordering the University to grant life tenure to an individual claimant. Such a rule conflicts with this Court's well-settled principle that government may not infringe upon First Amendment-protected interests unless it is established that the governmental action is (1) intended to achieve a compelling governmental interest and (2) narrowly tailored to serve that interest. See *Landmark Communications, Inc.*, 435 U.S. at 841-42; *First National Bank of Boston*, 435 U.S. at 786, 793-95.

Assuming that the anti-discrimination goals of Title VII further a compelling governmental interest in this context, the First Circuit's rule that tenure automatically follows from liability is not narrowly tailored to furthering that interest. There is no basis in the record to support the assumption that an unbiased reconsideration of respondent's tenure application would be impossible. Such an equitable award would completely vindicate Title VII's goals without unnecessarily infringing upon the First Amendment academic freedom interests at stake. Because the First Circuit's rule plainly goes be-

yond providing a "narrowly tailored" remedial response, it conflicts with this Court's clear teachings concerning the scope of governmental intrusions into First Amendment protected areas. Accordingly, review by this Court is warranted.[17]

II.

The use by the court below of a "harmless error" analysis to excuse the error in admitting evidence relating to the President's scholarly writings and the Dean's curriculum decisions also presents an important question of federal law which should be decided by this Court. Although the application of the harmless error doctrine in both civil (see *McCandless* v. *United States*, 298 U.S. 342 (1936)) and criminal (see *Kotteakos* v. *United States*, 328 U.S. 750 (1946)) cases is well-established, this Court has never addressed the issue whether, in a civil case, the occurrence of *constitutional* error demands a showing that the error was "harmless beyond a reasonable doubt."

In *Chapman* v. *California*, 386 U.S. 18, 21 (1967), this Court was "urged by petitioners to hold that all federal constitutional errors, regardless of the facts and circumstances, must always be deemed harmful" and accordingly, the "harmless error" doctrine was *per se* inapplicable to constitutional errors. The Court declined to

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[17] The First Circuit's tenure rule seems particularly troublesome as applied to this case because the jury was improperly instructed three times that it was not to respect the University's "independent judgment in choosing faculty" if the decision was "tainted" by impermissible reasons. App., *infra*, 32a-33a. Although agreeing with the University that "a 'tainted' decision is not necessarily one that would have been different 'but for' the taint," the First Circuit did "not think" that the instructions as a whole confused the jury. App., *infra*, 33a. The instructions raise serious doubt that the jury, in finding that respondent was discriminated against in violation of Title VII, gave adequate deference to the University's legitimate concerns about respondent's academic qualifications for an award of lifetime tenure.

adopt a *per se* rule stating that "there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless . . . ." *Id.* at 22. The Court also noted that neither the federal rules of procedure nor the relevant federal statute, 28 U.S.C. § 2111, "distinguishe[d] between federal constitutional errors and errors of state law or federal statutes and rules." *Id.*[18]

The Court, however, articulated two different standards for determining in criminal cases whether an error at trial was "harmless." First, under the basic "harmless error" standard, non-constitutional errors in criminal cases constitute a basis for reversal only where, after examining the record as a whole, the court concludes that the error may have had "substantial influence" on the outcome. See *Kotteakos* v. *United States*, 328 U.S. 750 (1946); *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 256 (1988) (dismissal of indictment appropriate only where error "substantially influenced the grand jury's decision to indict" (quoting *United States* v. *Mechanik*, 475 U.S. 66, 78 (1986)); *United States* v. *Hastings*, 461 U.S. 499, 510-11 (1983). The courts of appeals have interpreted this standard to be analogous to the standard of proof in a civil trial—*i.e.*, a reviewing court in a criminal case may affirm despite a non-constitutional error if it is "more probable than not" or "reasonably probable" that the error did not affect the verdict. See *United States* v. *Valdez*, 722 F.2d 1196, 1204 (5th Cir. 1984); *United States* v. *Valle-Valdez*, 554 F.2d 911, 915 (9th Cir. 1977).

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[18] Section 2111 provides that a federal appellate court shall:

> give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

28 U.S.C. § 2111.

Second, in criminal cases involving constitutional error, the Court held that the likelihood that the error was "harmless" should be judged by a higher standard:

> before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.

Chapman, 386 U.S. at 24; see *Hastings*, *supra*, 461 U.S. at 512; see also 3A C. Wright, *Federal Practice and Procedure: Criminal* § 855 (1982). This distinction between constitutional and non-constitutional standards for review of criminal cases is well established. See *e.g.*, *Valdez*, 722 F.2d at 1204; Saltzburg, *The Harm of Harmless Error*, 59 Va.L.Rev. 988, 999 (1973); 21 C. Wright & K. Graham, *Federal Practice and Procedure: Evidence* § 5035 (1977).

The Court in *Kotteakos* specifically left open the issue whether the "harmless error" standards adopted in criminal cases might be different in cases "involving only some question of civil liability." 328 U.S. at 762-763. Nevertheless, many courts and commentators have urged that—at least with respect to non-constitutional errors—there should be no difference in the standards applied in criminal and civil cases. See *McQueeney* v. *Wilmington Trust Co.*, 779 F.2d 916, 925 (3d Cir. 1985); *Lockhart* v. *Westinghouse Credit Corp.*, 879 F.2d 43, 53 (3d Cir. 1989); 1 J. Wigmore, *Evidence*, § 21 (1983); R. Traynor, *The Riddle of Harmless Error* 48 (1970); 11 C. Wright & A. Miller, *Federal Practice & Procedure: Civil* § 2883 (1973). Other courts and commentators, however, arguing by analogy to the different standards of proof in criminal and civil cases, have suggested that it should be more difficult to prove that an error was "harmless" in the criminal context than in the civil context. See *McIlroy* v. *Dittmer*, 732 F.2d 98, 105 (8th Cir. 1984); *Haddad* v. *Lockheed California Corp.*, 720 F.2d 1454, 1459 (9th Cir. 1983); Saltzburg, 59 Va.L.Rev. at 994-998.

The same analogy can be drawn from criminal to civil cases involving *constitutional* errors. Wright and Miller argue that the higher standard—that "the error was harmless beyond a reasonable doubt"—ought to be adopted in civil cases. They reason that "[d]ifferent considerations apply in civil cases than in criminal actions, but it is the same Constitution involved." 11 C. Wright & A. Miller, § 2883, at 280. They therefore conclude that the "distinction between constitutional and non-constitutional error" should have the same impact in review of civil cases as in review of criminal cases. *Id.*

This case presents an excellent vehicle for this Court to address the conflicting standards for "harmless error" analysis in civil cases. Despite *five* clear evidentiary errors in the trial court record—including two acknowledged errors of constitutional dimension [19]—the court found the errors both individually and cumulatively to be "harmless." App., *infra*, 54a-55a. Moreover, it did so by application of the non-constitutional standard which only required the court to find that errors "more likely than not" had no effect on the jury's verdict. See App., *infra*, 60a ("impact of the errors would in all likelihood have not affected the jury verdict"). If, in fact, petitioners are correct that the heightened standard of *Chapman* is applicable in the civil context, then the First Circuit's treatment of the constitutional errors is clearly incorrect and in conflict with *Chapman*. On that basis

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[19] The First Circuit acknowledged that these errors could have a chilling effect on academic speech and decisionmaking. See *supra*, 13-14. Indeed, the admission of the University President's speech and the Dean of CLA's funding decision on the Women's Studies Program would have a chilling effect on the First Amendment rights of the individuals involved as well an effect on the institutional academic freedom right of the University. See Byrne, *Academic Freedom: A "Special Concern of the First Amendment,"* 99 Yale L.J. 251, 255 (1989); Note, *Preventing Unnecessary Intrusions on University Autonomy: A Proposed Academic Freedom Privilege*, 69 Calif. L. Rev. 1538, 1549-51 (1981).

alone the issue is independently worthy of review by this Court, and it is particularly appropriate for review if the Court is inclined to grant review of the first issue presented.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 24, 1990

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 88-1288

JULIA PREWITT BROWN,
Plaintiff, Appellee,

v.

TRUSTEES OF BOSTON UNIVERSITY,
Defendant, Appellant.

Appeal from the United States District Court
for the District of Massachusetts

[Hon. Walter Jay Skinner, *U.S. District Judge*]

December 1, 1989

Before
Campbell, *Chief Judge*,
Breyer and Torruella, *Circuit Judges*

Stanley R. Strauss with whom *Charles I. Cohen, Gregory W. Homer, Vedder, Price, Kaufman, Kammholz & Day, Michael B. Rosen, Sandra S. McQuay* and *Goodwin, Proctor & Hoar* were on brief for appellant.

John A. Beach, *Thomas G. Eron* and *Bond, Schoeneck & King* on brief for Syracuse University, Amicus Curiae.

Sheldon Elliot Steinbach, General Counsel, *Woodley B. Osborne* and *Hanna, Gaspar, Osborne & Birkel* on brief for American Council on Education, Amicus Curiae.

Robert E. Sullivan, *John T. Harding, Jr.*, *Jeffrey F. Jones* and *Palmer & Dodge* on brief for Massachusetts Institute of Technology, President and Trustees of Williams College, Boston College, Tufts University, Suffolk University and Adelphi College, Amici Curiae.

Dahlia C. Rudavsky with whom *Ellen J. Messing* and *Shilepsky, Messing & Rudavsky* were on brief for appellee.

Beatrice Valdez with whom *Charles A. Shanor*, General Counsel, *Gwendolyn Young Reams*, Associate General Counsel, and *Lorraine C. Davis*, Assistant General Counsel, were on brief for Equal Employment Opportunity Commission, Amicus Curiae.

Mary W. Gray, American University, *Ann H. Franke*, Counsel, American Association of University Professors, and *William Van Alstyne*, Duke University School of Law, on brief for the American Association of University Professors, Amicus Curiae.

CAMPBELL, *Chief Judge*. Julia Prewitt Brown, an assistant professor of English at Boston University sued in the Massachusetts Superior Court after she was denied tenure by defendants, the Trustees of Boston University ("University"). The University removed the case to the District Court for the District of Massachusetts. Alleging that she had been refused tenure because of her sex, Professor Brown contended that denying her tenure for that reason violated an anti-discrimination clause in the University's collective bargaining agreement with its faculty. A jury found in her favor on this contract claim; it awarded her $200,000 damages for the breach. Brown also brought claims for the alleged sex-based denial of tenure under Title VII of the Civil Rights Act of 1964,

42 U.S.C. § 2000e *et seq* (1982), and under the Massachusetts anti-discrimination statute, Mass. Gen. L. ch. 151B, § 4 (1982). Applying to these other claims the finding of sex discrimination made by the jury in the contract action, the district court ordered the University to pay Brown $15,000 in damages for emotional distress, enjoined the University from further sex discrimination against Brown and other faculty members, and ordered the University to grant to Brown the position of Associate Professor with tenure. Boston University appeals from the jury verdict, the award of tenure, and the injunction from further sex discrimination. We affirm the findings of liability and the tenure award, but slightly modify the anti-discrimination injunction.

I. *Background*

In the fall of 1974, plaintiff Brown began working at Boston University as an Assistant Professor of English Literature, on the tenure track. Tenure candidates had to teach for six years before being eligible for tenure. During the sixth year the candidate was evaluated in three areas: scholarship, teaching, and service to the university. Excellence had to be demonstrated in two of the three areas.

Brown came up for tenure in the academic year 1979-80. At this time the ground rules for tenure review were spelled out in a recently negotiated collective bargaining agreement ("Agreement" or "Contract") between the Boston University Chapter of the American Association of University Professors ("Chapter") and Boston University. The process was to last the entire academic year, progressing through a series of committee and individual reviews culminating in a review by the President of the University, who then made a recommendation to the Trustees. The Trustees made the final decision to grant or deny tenure.

Brown prepared a dossier describing her accomplishments. Under the heading "Research and Publication," she listed a book, *Jane Austen's Novels: Social Change and Literary Form*, a revision of her Ph.d dissertation that had been published by the Harvard University Press, and three book reviews or review essays. Brown listed "all reviews, discussions and major citations" of her book, which included a review in the *New York Times Sunday Book Review*, four other reviews, two "readers' reports" from Harvard University Press and a letter from Harvard University Press concerning a second printing of the book. Under "work in progress" Brown listed a proposed book about Oscar Wilde. During academic years 1979-80, the year of her tenure review, she had received a Mellon grant to research and write this book, as well as to teach at Harvard University. Brown attached to her tenure dossier the six page prospectus describing her planned study of Oscar Wilde that had earned her the $16,000 Mellon grant.

Under the category of teaching, Brown listed the courses she had taught at Boston University, including two she had developed, "Fiction and National Character" and "Freud and the Victorian Novel." In respect to advising, she stated that she advised 15-20 undergraduates in composing their class schedules, spending about an hour per year with each student. She also described her activities on a committee that assisted undergraduate English majors in choosing a graduate school, and noted that, in 1977-78, she conducted a "woman's literature discussion group for graduate students which met informally once every two weeks." In the category of service to the University, Brown noted that she had been asked to assist in editing the "Partisan Review" for 1979-80, and listed service on various Boston University committees.

The first stop for Brown's file was a committee composed of all the tenured professors in the English department. The department committee voted unanimously, by

a vote of 22-0, to promote her to Associate Professor with tenure. The department chairman's rationale included high praise for Brown's teaching and scholarship. On September 14, 1979, the chairman wrote, "[a]s a teacher, Judy Brown has two talents in rare combination. She has a very detailed and exact grasp of works of literature and she is able to see them in a larger cultural and historical perspective." The chairman stated that Brown's book on Jane Austen had been widely recognized by noted critics. He opined that "[i]t is rare for an older, let alone a younger, critic to write an important book on a major writer . . . but Judy Brown has done so." In describing the book, the chairman noted Brown's "sensitivity to the fact that Jane Austen was a *female* novelist." The recommendation continued, "Professor Brown has the requisite literary tact to write about Jane Austen as a female writer without the ideological distortion and special pleading that sometimes mar such criticism."

The next review was by the Appointments, Promotions and Tenure Committee ("APT") of the College of Liberal Arts (CLA). This committee also recommended tenure, again unanimously. The committee's report described her as an "excellent teacher" and "a first rank . . . scholar," saying that "she is bound to become a most distinguished and nationally recognized critic and scholar." On December 7, 1979 the APT sent its report to the Dean of the CLA. Before making his own recommendation, the Dean met with Brown. At that meeting, the Dean gave Brown the opportunity to answer criticism received in a letter solicited from an outside scholar in Brown's field. The Dean also asked Brown about the amount of time she spent advising students. After this meeting, the Dean recommended promotion and tenure. However, the Dean's report contained reservations about Brown's "historical scholarship," citing certain negative comments in a review and in the outside scholar's letter. The Dean recommended that subsequent reviewers solicit the view of an

historian from Harvard University. He suggested that if the criticisms of the historical scholarship in Brown's book proved to be valid, the University should offer Brown a three year extension of her probationary period, so that her work on Oscar Wilde could be evaluated.[1] The Dean also characterized Brown's teaching as "fine," but expressed concern that she did not spend enough time advising students. The Dean sent a letter to Brown informing her that he had recommended her for tenure, but not mentioning the reservations he had expressed or his recommendation of a possible three year extension.

The week after the Dean completed his evaluation, Brown sent him a letter, along with additional material for her file. The letter dealt with the amount of time Brown spent advising students, saying that in addition to helping her advisees to prepare their schedules, she had office hours for four hours per week, of which most of her advisees took advantage. She included in the letter the names of three former advisees who would speak on her behalf. Brown also informed the Dean that her book had been nominated by the Harvard University Press, along with four others, for the James Russell Lowell Award, sponsored by the Modern Language Association.[2]

Notwithstanding the Dean's reservations, Brown received a further positive vote at the next level of review, a University-wide APT, which recommended tenure and

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[1] While professors who were not granted tenure ordinarily had to leave after one more year, the Agreement allowed a three year extension of the normal six year probationary period "in occasional cases of substantial merit where a faculty member is potentially tenurable, but where further scholarly work is expected to be completed in short order." Such an extension required the agreement of the candidate and the various university groups and officials who passed on tenure. *See* n.3, *infra*.

[2] Brown testified that "[t]he award is given to the work of literary criticism judged most distinguished by a group of scholars every year."

promotion by a vote of 9-2. The committee report to the Provost concluded that "Dr. Brown is a serious and committed teacher-scholar who at a very early age has already made her imprint in one of the toughest and most competitive of fields. . . ." Next, at the level of the Provost's review, an Assistant Provost, Simon Parker, evaluated Brown's candidacy. Parker's memo to the Provost expressed concern about the quality of Brown's book, although he praised the book generally. Parker recommended a three year extension, stating that "Brown's publishing achievements are limited in quantity to a revised dissertation and three book reviews. . . . The three year extension will enable her to finish this major *independent* work [the Oscar Wilde book], and prove whether she is able to sustain and improve the quality of her work as a maturing humanist."

Soon after the Assistant Provost completed his assessment, Brown requested from her department head a maternity leave of absence for the upcoming semester, which was granted. Next, the Provost concurred with Parker's assessment and advised Brown that he had recommended to the University's President, Dr. John Silber, that she be given a three year extension. Since the three year extension clause of the agreement required the concurrence of Brown and all three committees,[3] her candidacy was again put to a vote. The 23 tenured members of the English department sent a letter to the Provost stating that "[i]t is the unanimous view of the Department that your recommendation . . . does not take into account the substance of the case for Professor Brown made by the Department and Faculty Committees" and urging the Provost to make a recommenda-

[3] The relevant portion of the agreement provides: "Such an extension shall be allowed only once for any candidate and only by agreement of the candidate, the department, the School APT [Appointment, Promotion and Tenure Committee], the University APT and the Administration."

tion of tenure. The College APT sent a brief memo stating that it "wish[ed] to reaffirm our original unanimous recommendation for tenure and promotion for Professor Brown." The University APT, which originally had voted 9-2 for tenure, wrote that its members agreed Brown's scholarship "had reached sufficient maturity to warrant our recommendation." The minutes of the Committee's meeting reveal that the "Committee unanimously (10/0) agreed to reaffirm its original positive recommendation. The members did not wish to reject the extension in the event that Professor Brown agreed to it." Another exchange of letters between the Provost and the Department resulted in the unequivocal statement of the Department Chairman that "the [Department] Committee . . . refused to assent to a three year extension for [Brown] by a unanimous vote." On the same date, Professor Brown wrote to the Provost indicating that she did "not accept the recommendation of a three year extension."

In response, the Provost informed Brown that he had recommended against tenure. Because the Provost's recommendation was not in accordance with the judgments of the College and University APTs, Brown's case was forwarded to a three-member *ad hoc* Tenure Review Committee. The Agreement provided that the *ad hoc* Committee

> shall be composed of three impartial persons from outside of Boston University who shall be acknowledged authorities in the candidate's field or academic specialty. One of these three persons shall be designated by the Provost, one by the University APT, and one by mutual agreement between the two persons already designated.

The *ad hoc* committee voted for tenure by a margin of 2-1. The committee's report stated that the committee

> found Professor Brown's book on Jane Austen to be a substantial contribution to Austen studies. . . .

> [W]e evaluated the book as useful and sometimes brilliant; we were not much impressed by its historical dimensions and found the statements about historicity a bit misleading. We agreed that the mind behind the book was a first-rate one, one that perhaps still had some maturing to do, but one that was capable of excellent original critical thinking.

The report also stated, "[w]e all regretted that we had no further work on which to judge Professor Brown; one committee member felt that such a lack of evidence of wider commitment was crucial. . . ."

Upon receipt of the *ad hoc* committee's report, the Provost reported to President Silber that "[t]he report does not give a strong, unqualified endorsement of the candidate's work. Rather it confirms my earlier judgment that Professor Brown has not yet established a sufficiently strong scholarly record to merit tenure at Boston University." President Silber then informed Brown that "I shall recommend to the Trustees that tenure not be granted."

Brown subsequently wrote to ask President Silber to reconsider her case, making several charges of unfair treatment and irregularities over the course of her tenure candidacy. Brown raised the issue of sex discrimination, telling President Silber that "[o]ne of the main problems that women in my profession have is that they are frequently put under the microscope, in a way that men often are not, when seeking promotion." Brown compared her qualifications to those of several men who had been granted tenure in her department and in the year of her candidacy, saying that both the Dean and the Provost may have held women to higher standards than those imposed on men who had been granted tenure. The Dean, Brown said, singled her out for unusual treatment, recommending that her work be reviewed by someone outside her field, a historian, when he made no such recommendation concerning the candidacies of several

men who were up for tenure. Brown also suggested that the Provost's treatment of her case had been more exacting than his treatment of men candidates. Brown asserted that although the Provost's expressed concern was with the quantity of Brown's scholarly work, the Provost had recommended tenure for another man in Brown's department who had produced a smaller amount of scholarly work. President Silber responded that he had reviewed Brown's case as she requested, but that he would stand by his earlier decision. On President Silber's recommendation, the Trustees denied Professor Brown tenure.

Soon after receiving President Silber's final letter, Brown brought suit in the Massachusetts Superior Court, alleging that Boston University had violated the Agreement by discriminating against her on the basis of her sex.[4] Boston University removed the suit to the United States District Court for the District of Massachusetts, alleging subject matter jurisdiction under Section 301(a) of the Labor Management Relations Act ("Act"), 29 U.S.C. § 185(a) (1982), which confers federal jurisdiction over "[s]uits for violation of contracts between an employer and a labor organization representing employees. . . ." After completing the required administrative procedures, Brown amended her complaint to include claims that the University's actions violated Title VII

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[4] Brown's complaint also alleged that Boston University had violated the terms of a settlement agreement entered into at the time the Agreement was negotiated, which provided that "there shall be no reprisals or abuse, either institutional or personal, against any member of the University community for his/her actions during the strike." Prior to the Agreement's execution, the Boston University faculty had engaged in a labor strike. Brown participated in the strike, picketing in front of President Silber's office and in front of an office of one of the University's Trustees. At trial, the jury found that Boston University had not discriminated against Brown on the basis of her strike activity. Brown has not appealed from that finding. Therefore, we address only the issue raised as a result of the jury's finding that Boston University discriminated against Brown because of her sex.

of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, and the Massachusetts antidiscrimination statute, Mass. Gen. L. ch. 151B § 4.

Prior to trial, the University moved for summary judgment as to Brown's contract claims[5] and for denial of Brown's jury demand as to all counts. The district court refused to grant summary judgment against Brown on her claim that the University had violated the Agreement. The court ruled that Brown was entitled to a jury trial on the contract claim, because "[a] complaint which alleges a breach by an employer of a collective bargaining agreement in which the plaintiff seeks back pay states a claim for legal damages, and the plaintiff has a right to trial by jury on that claim." Recognizing that Brown had no right to a jury trial on either the Title VII or the Chapter 151B claims, the court ruled that Brown's right to a jury trial on her contract claim extended to all issues common to the three separate claims. *See Curtis* v. *Loether*, 415 U.S. 189 (1974). The most important factual issue common to the three claims was whether Boston University had denied Brown tenure because of her sex.

Brown's evidence at the trial compared her qualifications, including her published writing, with those of others, particularly males, in English and related fields who had been granted tenure. She placed in evidence the voluminous tenure files of herself and of the allegedly "similarly situated" faculty members. She called as witnesses several Boston University professors, including two former heads of the English Department, who had participated in her own tenure review as well as the tenure reviews of others during this period. Several wit-

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[5] Brown's complaint included two contract claims, one for violation of the Agreement and one for violation of the covenant of good faith and fair dealing implicit in the Agreement. The district court granted summary judgment for the University on the latter, and no appeal was taken.

nesses interpreted scholarly reviews and gave their opinions on how to compare the various files. The thrust of Brown's comparative evidence was that she had been held to a stricter standard than her male peers.[6]

Brown also presented evidence of alleged irregularities in her tenure review, particularly with regard to the inclusion of the single dissenter on the *ad hoc* committee, whom Brown sought to show was a long-time associate of President Silber's, had previously clashed with faculty in Boston University's English Department, and was not, in Brown's view, an "acknowledged authority" within

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[6] Brown introduced evidence showing that over the six year period prior to the time the University denied her tenure no single tenure candidate in the English department had a second published book, and that all the books published by tenure candidates in the department were based on the candidates' dissertations. (This contrasts with testimony from the President suggesting that Brown's qualifications were inadequate because she had published only one book, and that was based on her dissertation.) One male English teacher who was granted tenure shortly after the President made his final decision to deny Brown tenure had not written any book, and while he had written several articles, none of them had received reviews. The evidence also showed that during this time Brown was the only candidate in the English department to be denied tenure after having published a book and having it reviewed. There was evidence that Brown's publisher, the Harvard University Press, had very high standards.

In addition, Brown's evidence showed that her support from the various tenure committees was quite high when compared to the votes on English professors who received tenure around the time of Brown's candidacy. While a couple of successful candidates received support comparable to Brown's, including unanimous votes from the English Department, there were others with much less support who nonetheless received tenure. The male English professor who received tenure shortly after Brown was denied tenure received a 16-6 vote in favor of tenure from the English Department; a 2-5 vote against tenure from the College APT committee; and an 8-3 vote in favor of tenure from the University APT committee. A male English professor who received tenure before Brown's review period had received a vote of 10-4 in favor of tenure from the English Department.

Brown's academic specialty, as required by the Agreement. Brown also introduced evidence from which she argued the jury could infer that President Silber and the Dean of the CLA harbored discriminatory attitudes towards women.

The University called as witnesses Geoffrey Bannister, the Dean of the College of Liberal Arts; Simon Parker, the Assistant Provost; and John Silber, the President of the University. They testified that Brown was denied tenure and instead offered a three year extension, because of good-faith, non-discriminatory concerns regarding the adequacy of her scholarship.

The district court told the jury to decide whether Brown had met her burden of persuading them that the reason offered by the University for denying her tenure was a pretext for discrimination based on her sex. A special verdict form was handed to the jury. Among the questions on the form was "Do you find that the Trustees at Boston University refused to grant tenure to the plaintiff because of her sex?" The jury answered this question "yes," and found damages in the amount of $200,000 as a consequence of the breach of contract.

Although recognizing that Brown's claims under federal and state civil rights statutes were not, by themselves, triable to a jury, the court held that the jury's finding of sex discrimination under the contract claim was determinative of the University's liability under the two statutes. The district court determined that under those statutes, Brown was entitled to $15,000 for emotional distress and reinstatement to the position of associate professor with tenure.[7] The district court also enjoined the

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[7] The district court ruled that damages for emotional distress may be recovered under Massachusetts civil rights law. *Brown* v. *Trustees of Boston University*, 674 F. Supp. 393, 395 (D. Mass. 1987) (citing *Bournewood Hospital, Inc.* v. *M.C.A.D.*, 371 Mass. 303, 358 N.E.2d 235 (1976); *College-Town, Division of Interco, Inc.* v. *M.C.A.D.*, 400 Mass. 156, 508 N.E.2d 587 (1987)).

University "from discrimination on the basis of sex with respect to the appointment, promotion and tenure of faculty members, and in particular with respect to the promotion, salary or other benefits to which the plaintiff may become entitled," and awarded Brown her reasonable attorneys' fees and expenses of suit. The district court denied the University's subsequent motions for judgment notwithstanding the verdict and for a new trial.

On appeal, the University alleges error in the court's evidentiary rulings and in the jury charge. The University also contends that the district court lacked jurisdiction over the contract claim, hence erred in applying the jury's sex discrimination finding to the federal statutory claims. Further, the University contends that the district court's award of tenure impermissibly intruded into the operations of the University, and that the anti-discrimination injunction is overbroad.

II. *Applicable Law*

Title VII of the Civil Rights Act of 1964 provides

> [i]t shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin.

42 U.S.C. § 2000e-2(a)(1).[8] When Title VII originally was enacted, Congress exempted from it educational institutions. In 1972, however, Congress removed this exemption, in response to widespread concern about employment discrimination in educational institutions. *See* H.R. Rep. No. 238, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Admin. News 2137, 2154-55 ("Discrimination

[8] The Massachusetts statute makes essentially the same provision. Mass. Gen. L. ch. 151B, § 4.

against minorities and women in the field of education is as pervasive as discrimination in any other area of employment. . . . [W]omen have long been invited to participate as students in the academic process, but without the prospect of gaining employment as serious scholars. . . . The committee cannot imagine a more sensitive area than educational institutions where the Nation's youth are exposed to a multitude of ideas that will strongly influence their future development. To permit discrimination here would, more than in any other area, tend to promote misconceptions leading to future patterns of discrimination."); H.R. Rep. No. 554, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Admin. News 2462, 2511-12 (noting that female faculty at institutions of higher learning were, in 1972, much less likely to be associate or full professors and that in 1965-66 the median salary of female full professors was $11,649 compared with $12,758 for men).

Title VII strikes a balance between protecting employees from unlawful discrimination and preserving for employers their remaining freedom of choice. *Price Waterhouse* v. *Hopkins*, 109 S. Ct. 1775, 1785-86 (1989). In tenure cases, courts must take special care to preserve the University's autonomy in making lawful tenure decisions.

> [C]ourts must be extremely wary of intruding into the world of university tenure decisions. These decisions necessarily hinge on subjective judgments regarding the applicant's academic excellence, teaching ability, creativity, contributions to the university community, rapport with students and colleagues, and other factors that are not susceptible of quantitative measurement. Absent discrimination, a univermust be given a free hand in making such tenure decisions.

Kumar v. *Board of Trustees, University of Massachusetts*, 774 F.2d 1, 12 (1st Cir. 1985) (Campbell, C.J., concur-

ring), *cert. denied*, 475 U.S. 1097 (1986). At the same time, however, an employee's right not to be denied tenure for discriminatory reasons prevents insulating the tenure process from any judicial review. As in other forms of employment, an inference of discrimination can be derived from a showing that a university's given reasons for denying tenure to the plaintiff were "obviously weak or implausible," or that the tenure standards for prevailing at the tenure decisions were "manifestly unequally applied." *Id.* at 15. The essential words here are "obviously" and "manifestly." A court may not simply substitute its own views concerning the plaintiff's qualifications for those of the properly instituted authorities; the evidence must be of such strength and quality as to permit a reasonable finding that the denial of tenure was "obviously" or "manifestly" unsupported. In this case, Brown's burden was to show that the University *manifestly* applied an unequal standard to her tenure application.

III. *Evidentiary Issues*

A. *Testimony of Professors Goodheart, Craddock, Vendler and Speisman and excluded testimony of Professor Clarke*

The University protests permitting four professors—Professor Goodheart, who served as Chairman of the English department at the time of Brown's tenure candidacy, Professor Craddock, Professor Speisman, and Professor Vendler—to compare Brown's qualifications with those of other faculty members considered for tenure at Boston University.[9] The University also complains that the district court erred in excluding the testimony of Professor Clarke, who chaired the College APT. Clarke would have testified that his vote for Brown was premised on a

[9] Brown asserts that the University has waived this issue by failing to object below to the specific testimony challenged in this appeal. We have reviewed the record and find that the University's objections sufficed to preserve the issue for appeal.

misperception of her progress on the Wilde book. We do not find prejudicial error.

The University contends that the four professors' testimony should have been excluded both because the testimony invited the jury to substitute its own tenure judgment for that of the University, and because these professors' testimony had not, as such, appeared in Brown's tenure file and, therefore, was unavailable to the University when it decided Brown's case.[10]

Federal Rule of Evidence 402 allows the admissions of all relevant evidence and prohibits the admission of irrelevant evidence. Rule 403 permits the exclusion of relevant evidence of its probative value is outweighed by the danger of unfair prejudice or comparable factors. "A trial judge has much latitude in these matters." *Dente* v. *Riddell, Inc.*, 664 F.2d 1, 5 (1st Cir. 1981) (citations omitted). "A district court's ultimate determination in such a situation is reviewed on appeal only for abuse of discretion." *United States* v. *Gonsalves*, 668 F.2d 73, 75 (1st Cir.), *cert. denied*, 456 U.S. 909 (1982).

We see no abuse of discretion in admitting this evidence. Insofar as the four professors' testimony tended to show that the qualifications of others granted tenure were beneath Brown's *known* qualifications, it was relevant to create an inference that the University's criticisms of Brown's scholarship were pretextual. A sex discrimination plaintiff

> may attack the motive advanced by the university in one of two ways: she may try to show that the motive is not worthy of belief; or she may try to show

[10] It is not denied that the four testifying professors had taken part in Brown's tenure review. As English Chairman, Professor Goodheart had written the English Department's favorable evaluation and the others had voted for tenure. The University's point is that the express reasoning in Brown's favor set forth in their testimony, had never gone to the President, Provost, Dean and other evaulators at the time she was turned down.

> that in fact some other motive explains the university's action better than the motive offered. . . . To prove the proffered motive is not worthy of belief, evidence of a comparative sort is appropriate; if others were hired or promoted though by the same reasoning they ought to have been excluded, then the motive is a "pretext."

Namenwirth, 769 F.2d at 1240 (citations omitted).

To be sure, in balancing the probativeness of evidence like this against its danger for unfair prejudice, a court should realize that comparing the qualifications of others granted tenure with those of plaintiff presents the risk of improperly substituting a judicial tenure decision for a university one. To admit such comparative evidence, the trial court must be satisfied, and we must later be satisfied on appeal, that the evidence is so compelling as to permit a reasonable finding of one-sidedness going beyond a mere difference in judgment.

That criterion was met here. The English Department voted 22-0 for tenure; the CLA APT was unanimous; the University-wide APT was almost unanimous at first and and was unanimous a second time. The outside Tenure Review Committee favored tenure 2-1. The witnesses whose testimony is challenged included two former department heads who were well acquainted with the tenure process and with those who had been tenured or rejected around Brown's time. They testified that Brown was either superior or equal to the other candidates who had received tenure. They testified that none of these others had been required to write a second book. The first book of the others, rewritten from a thesis, had sufficed. One had not written any book. Yet notwithstanding acceptance and publication of Brown's book by a leading university press, the Assistant Provost and President, while acknowledging Brown's promise, insisted that she needed to do more to qualify for tenure. The court was entitled

to conclude that a reasonable jury might in these circumstances properly find that the denial of tenure to Brown was "manifestly" unequal.

The University contends that the court improperly admitted as probative of Brown's scholarly credentials evidence of which the University lacked any knowledge when it denied tenure. We do not find this happened, except in two unimportant instances later discussed.

Professor Goodheart and Professor Craddock compared Brown's qualifications with other members of the English department who were reviewed for tenure within a few years before and after Brown's review. While their specific testimony had not, of course, been presented to those who considered Brown at an earlier time, it rested upon, and evaluated, the contents of the relevant tenure files. Those files had been before the reviewing authorities and were in evidence at trial. The University was free to present, and did present, evidence of contrary opinions as to Brown's comparative qualifications.[11]

Professor Speisman's testimony compared Brown's qualifications to those of the other candidates in the year of Brown's review. Although his opinion that Brown was among the top four candidates was not expressed as such in any of the tenure files, he testified that it was possible to reach such a conclusion from reading the APT reports about the candidates. The APT reports were available to the University at the time it evaluated Brown. The Provost and President could present their own different conclusions from their own readings of the reports. As with the other opinion testimony, the University could introduce contradictory evidence of its own concerning the significance of the APT reports.

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[11] Three of the University's witnesses—Dean Bannister, the Assistant Provost, Simon Parker, and President Silber—testified as to their opinions concerning how Brown's qualifications compared to those of other tenure candidates.

Professor Vendler's testimony similarly rested upon information that was available to the University at the time it evaluated Brown. In addition to comparing Brown's qualifications with those of others in the English Department, Vendler gave her opinion to the jury as to how to interpret the various scholarly reviews of the candidates' books. Both the reviews and publications were in evidence and had been before the persons evaluating the different applicants. Whether the reviews were "good" or "bad" was a disputed point. Evaluating them depended to some degree on the reputation of the reviewer in the field of the publication. It was within the court's discretion to allow expert opinion on this subject.

The University contends that the exclusion of Professor Clarke's testimony was prejudicial error. The University sought to have Clarke, the chair of the College APT, testify that he and other members of the committee were under the mistaken impression that Brown's book about Oscar Wilde was "forthcoming," and that this influenced the vote in Brown's favor. The district court excluded this testimony, ruling that Clarke's thoughts, other than his "yes" or "no" vote, were not available to the University at the time it made the decision regarding Brown's tenure.

We believe that Clarke should probably have been permitted to so testify, although the University was less than clear as to the purpose for which it was offering the testimony. The court understood that the University was offering Clarke's testimony merely to impeach his previous affirmative vote for Brown. Why Clarke voted as he did was irrelevant, since only the vote appears in the tenure file, and there was no reason to let Clarke impeach the vote. A proper reason to have accepted Clarke's testimony, however, was that it demonstrated Clarke's opinion that progress on the Wilde piece was important. President Silber and Assistant Provost Simon later testified that one reason for withholding tenure for three more

years was to await Brown's work on the Wilde piece. Clarke's testimony would have tended to show that their judgment in this regard was a reasonable one. Assuming, without deciding that the district court abused its discretion in not permitting Clarke's testimony for this purpose, we do not find that the ruling prejudiced the University. The University introduced ample other evidence that a reasonable reviewer would be interested in the development of Brown's work subsequent to her first book. The Dean testified to this effect, and the report of the ad-hoc tenure committee, which was introduced into evidence, referred to the Wilde book, and stated that all three members (two of whom voted for tenure) "regreted that [they] had no further work on which to judge Professor Brown; one member felt that such evidence of wider commitment was crucial." Particularly given the University's failure to make clear that Professor Clarke's testimony was being sought as evidence of an expert's opinion on the importance of the Wilde piece, we do not find reversible error in its exclusion.

There were two instances where the court improperly admitted testimony going to Brown's credentials which was not in her tenure file and was not otherwise admissible. First, the district court allowed Professor Craddock to testify about Brown's reputation within her field outside the University. Professor Craddock testified that Brown had established a reputation within her field among Craddock's colleagues outside the University that "would have been a credit to the [English] Department." Since Craddock did not indicate that the University administration knew of this, it was irrelevant to show bias. We see no harm from this testimony, for two reasons. First, the APT report in Brown's tenure file makes substantially the same point.

> [H]er scholarly accomplishments have been *widely recognized.* In a highly competitive field, her book was well reviewed in three very reputable journals

> (*Yale Review, Kirkus Review, Library Journal*) and in the *New York Times Sunday Book Review*. . . . [*B*]*rown has already made her imprint in one of the toughest and most competitive of fields*: English literature.

(Emphasis added). Second, the district court gave the jury cautionary instructions on six occasions, three times during the trial and three times during the charge, not to substitute its judgment for that of the University on the issue of tenure. We find no prejudice to the University on this score.

The University also attacks admission of Professor Goodheart's following testimony:

> Q. How does the quality of Brown's book compare with books you review as part of the Emerson Prize Committee?
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> A. . . . I would have to see the other books, as well, to make the comparison, but, since I have read in this competition for three years, I know what the quality of the run of books is. . . .
>
> Q. How did Julia Brown's book compare to those books which made the finalist rounds, in terms of quality?
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> A. I think it is a comparable piece of work. I would certainly recommend it for further consideration. Whether it entered in the final round would depend upon the other books in the competition. That is speculative. That is hypothetical.

We see no material prejudice to the University from this testimony. It was, at best, a feeble endorsement of Brown's book. It was largely repetitive of material already found in Brown's tenure file. Professor Goodheart himself prepared the Department Chairman's report which was a part of Brown's tenure file. In that report,

he described Brown's book as "admirable." He also stated "[t]he distinction in Professor Brown's book is immediately manifest in the lucidity, elegance, and wit of the prose." Brown's tenure file contained the information that her book had been nominated for another prestigious prize. Any incremental increase in the jury's estimation of the book's praiseworthiness that may have resulted from Goodheart's testimony was negligible.

B. *Evidence of Remarks by President Silber*

The University challenges admission of remarks made by President Silber in 1982 and 1983, after Brown's tenure candidacy, relative to another female tenure candidate, Bonnie Costello. While being considered for tenure, Professor Costello was offered a tenured position at another university. As permitted by a provision in the collective bargaining agreement, Costello had asked President Silber to expedite her Boston University tenure review so that she could more intelligently deal with the other offer. Initially, Professor Craddock, then Chairman of the English Department, met with President Silber to discuss Costello's situation. Silber refused to speed up the process, although he did say that, when the file came to his desk, he would act on it swiftly. Professor Craddock testified that President Silber remarked that Costello was an outstanding scholar, saying "I don't see what a good woman in your department is worrying about. The place is a damn matriarchy." A few months later, Costello herself met with President Silber. Silber again refused to intervene in the tenure review process, telling Costello that a person with her credentials would do well "and anyway, I never worried about job security, and your husband is a parachute, so why are you worried[?]". Professor Costello rejected the outside offer and later in the year was granted tenure at Boston University. Brown also presented evidence that President Silber and the administration had expedited review in the case of a male professor who had received an outside offer.

Admission of evidence of these matters was not an abuse of the district court's discretion. Other courts have held that *prior* discriminatory conduct is recognized as probative in an employment discrimination case on the issue of motive or intent. *See* Fed. R. Evid. 404(b). The Seventh Circuit has remarked, "[g]iven the difficulty of proving employment discrimination—the employer will deny it, and almost every worker has some deficiency on which the employer can plausibly blame the worker's troubles—a flat rule that evidence of other discriminatory acts . . . can never be admitted without violating Rule 403 would be unjustified." *Hunter* v. *Allis-Chalmers Corp., Engine Div.*, 797 F.2d 1417, 1423 (7th Cir. 1986). Accordingly, "[t]he question of the legitimacy of the employer's motivation in firing the employee . . . is one upon which past acts of the employer has some bearing." *Morris* v. *Washington Metropolitan Area Transit*, 702 F.2d 1037, 1045 (D.C. Cir. 1983). *See also Hunter*, 797 F.2d at 1423-1424 (in an employment discrimination action, evidence of harassment against other black workers besides plaintiff was admissible to show that defendant "condoned racial harassment by its workers and [to] rebut[] [defendant's] defense that it had fired [plaintiff] for cause"); *Scaramuzzo* v. *Glenmore Distilleries, Co.*, 501 F. Supp. 727, n.7 (N.D. Ill. 1980) ("Evidence of past discrimination of an employer may in some circumstances support the inference that such discrimination continued. . . ."). *Cf. Jay Edwards, Inc.* v. *New England Toyota Distributor, Inc.*, 708 F.2d 814, 824 (1st Cir.) (in dealer's action against distributor claiming bad faith actions on the part of distributor, evidence of distributor's actions with other dealers was admissible on the issue of distributor's intent regarding its dealings with plaintiff), *cert. denied*, 464 U.S. 894 (1983).

Derogatory remarks indicative of a discriminatory attitude are also admissible in a proper case. *See Hunter*, 797 F.2d at 1423 (in employment discrimination action,

evidence that supervisor called blacks "niggers" was admissible to show what supervisor's racial attitudes were). *Cf. Carson* v. *Polley*, 689 F.2d 562, 571-73 (5th Cir. 1982) (performance evaluation report stating that defendant had a bad temper was admissible to show intent in action for assault and battery).

President Silber's conduct and comments were far weaker as indicative of a discriminatory attitude than those we have mentioned. While Silber did not expedite review in Costello's case, he did offer her tenure. Still, his comments reflected a patronizing attitude toward women—an attitude that might possibly have affected his earlier decision in Brown's case. At the time Silber called the English Department a "damn matriarchy," it had a female chairman and six other tenured female professors from among a total of 26 tenured English professors. That so small a proportion of women could provoke this comment suggests that the President might not be indifferent to the gender of a tenure applicant. Silber's "parachute" remark, especially when made in an official setting, likewise suggested a preoccupation with gender in a context where both the contract ad the law would expect a sex-blind approach.

To be sure, it is a tremendous leap to infer from remarks such as these that President Silber denied Brown tenure because of her gender. Besides recommending tenure for Costello, the evidence showed that President Silber had recommended tenure for many women. Nonetheless, the court correctly left the significance of the remarks to the jury. A judge should not exclude evidence which a reasonable jury might find relevant unless its probative value is substantially outweighed by the danger of unfair prejudice. Fed. R. Evid. 403.

That the remarks occurred subsequent, rather than prior, to the allegedly discriminatory conduct does not alter their admissibility. The jury was entitled to infer that any discriminatory animus toward women manifested

in 1982 and 1983 would have existed in 1980 and 1981, when President Silber acted on Brown's case. Evidence of a discriminatory cast to the views of one person in a university community might not, of course, be probative if the individual's role in the tenure decision were minor. President Silber's recommendation, however, was the final and most important one in the chain of tenure recommendations. He provided leadership to the University community. The jury could have inferred that the Provost and Dean, the other administrators who expressed doubts about Brown's suitability, would have been sensitive to the President's attitudes concerning tenure candidates.

The reason given by the Provost and President for withholding tenure went not to Brown's teaching ability nor to any deficiencies in her service to the university community, but to her lack of academic excellence. Yet Brown was recommended for tenure by virtually all of her academic peers, both in her own department and outside. It could be concluded that her academic reputation was superior to many who were tenured. In such circumstances, the district court was entitled to permit plaintiff to focus on the personality and predilections of the President, insofar as these suggested that he held a more traditional view of the woman's place.

While we thus uphold evidence of the Costello interchanges, we do not sustain the court's admission of a portion of a speech given by President Silber at a Freedoms Foundation Symposium on Citizen Responsibilities in 1984. In the speech, Silber discussed the decline of the traditional family and the consequential deterioration of children's education. He stated:

> the number of working mothers—that is, the proportion of children who do not have even one parent at home during the day—has increased sharply. . . . [T]he number of working wives—as opposed to work-

> ing mothers with children under 18—rose from 26 percent to 46 percent. Lack of parental supervision associated with both parents working explains in part that children typically watch 24 hours of television a week.

Brown asserts that this speech was relevant to show President Silber's view of working women, possibly explaining his motive in denying Brown tenure, especially in view of Brown's pregnancy and the birth of her first child during her tenure review. To our minds, this evidence is far afield. While evidence of *closely related* discriminatory conduct and remarks may be admissible in a case like this, it does not follow that plaintiffs may present ambivalent evidence. President Silber did not denigrate women in his speech. He did not say that women should not work; least of all did he suggest that professional women or others who might be able to obtain child care elsewhere should be denied promotion on merit. He merely quoted statistics showing the dimensions of a social problem that few people would deny exists, whatever the proper solution may be. It is an untenable leap from such a speech to the inference that the author would deliberately deny tenure to a qualified faculty member. Its relevance, if not quite zero, is close to that. While one would hope that jurors would see them for what they are, there is the danger such red-herrings, skillfully manipulated, could cause a jury to stray. We fear, moreover, the chilling effect that admission of such remarks could have on academic freedom. Use of such evidence in a court of law could cause a university president, dean or teacher to avoid topics of this kind altogether for fear that one or two sentences might later be used as evidence of alleged discriminatory animus. It was error to admit these remarks.

While we hold that the evidence should have been excluded, we do not believe that it effected the outcome of the trial. As we have said, the evidence is without pro-

bative value of sex discrimination. That children watch television because their mothers are not at home is a position commonly advocated in the press (and on television itself). To be sure, the matter was mentioned by plaintiff's counsel in closing argument. Nonetheless, while we find the error regrettable, we think it highly unlikely that these remarks, in a trial of this complexity and length, would have had an effect on the outcome. We, therefore, do not find the improper admission of this evidence to be prejudicial error.

C. *Evidence of the Dean's Attitude Toward the Women's Studies Program*

The University next challenges the district court's admission of a letter written by the Dean concerning a Women's Studies Program. Boston University offered a minor in Women's Studies, for which students were required to take a core course and a number of courses from a list of approved electives. Professor Brown never taught Women's Studies, but some of her courses were included on the list of electives. In 1978, the Dean of the CLA, who was the first to express reservations about Brown's scholarship, wrote a letter responding negatively to a request for funding for a half-time director for the Women's Studies program.[12]

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[12] The body of the letter read:

> My decision not to provide funding for a half-time director was not based on misapprehensions about the availability of grant funds. Frankly, it was based primarily on
>
> 1.) having no money,
> 2.) responding to the *committee's* request for someone "to write proposals",
> 3.) reservations about the academic orientation of Women's Studies.
>
> I believe the first two are immutable, but I am always open to discussion on the last. If there is a "distorted perception" of the scholarship, let us discuss it.

The University argues that the Dean's letter should not have been admitted, because Brown failed to show how the Dean's views on the Women's Studies Program had any bearing on her tenure. Brown argues that the evidence at trial showed that the approach in Brown's book was characterized by many as "a feminist interpretation" of Jane Austen. Brown further argues that the Dean's reservations about Brown's historical scholarship may have resulted from his general doubts about feminist scholarship.

For the same reasons given as to the President's speech, we hold that the district court erred in admitting this evidence. A panel of the Ninth Circuit has held that evidence of contempt for women's issues generally may in some circumstances be probative of a discriminatory attitude. *See Lynn* v. *Regents of the University of California*, 656 F.2d 1337, 1343 & n.5 (9th Cir. 1981) ("A disdain for women's issues, and a diminished opinion of those [including men] who concentrate on those issues, is evidence of a discriminatory attitude towards women."), *cert. denied*, 459 U.S. 823 (1982). But whether or not this is so in proper circumstances, we do not see how the Dean's expression of reservations about a particular academic department had, by itself, any tendency to show a discriminatory animus against women. Like the evidence of President Silber's speech, the admission of this kind of evidence totally removed from the incident that is the subject of the law suit worries us because of its effect on free speech in a university. A dean should not have to fear that he cannot express his opinion as to the *quality* of a particular studies program without this criticism being brought forward as evidence of sexism.

Still, when read in the context of this particular trial, we are not persuaded that the outcome was affected by the admission of this evidence. We hold that the admission of this improper evidence was harmless error.

In addition to challenging the admission of much of Brown's evidence, the University argues that "the relevant, properly admitted, evidence is insufficient as a matter of law to support a finding of sex discrimination against the University." As we interpret this argument, the University is contending that if we remove the evidence discussed above, the remaining evidence is insufficient to support the verdict. Since we rule today that the district court made no prejuicial error in admitting the evidence at issue here, we need not address this argument. Moreover, we need not consider the issue of the sufficiency of the evidence generally, for the University has not properly raised this issue. *See* Fed. R. App. P. 28(a) (brief must contain statement of issues presented for review and argument with respect to such issues); *Ortega Cabrera* v. *Municipality of Bayamon*, 562 F.2d 91, 102 n.10 (1st Cir. 1977) (issue not argued on appeal is treated as waived). Even if the University's statement that the properly admitted evidence was insufficient could be treated as raising the issue of the sufficiency of the evidence generally, the University has nonetheless abandoned this issue by failing to argue the point in its briefs. *See, e.g., Leer* v. *Murphy*, 844 F.2d 628, 634 (9th Cir. 1988) ("Issues raised in a brief which are not supported by argument are deemed abandoned."); *Hershinow* v. *Bonamarte*, 735 F.2d 264, 266 (7th Cir. 1984) (court will not consider issue presented in "perfunctory and underdeveloped a manner in [appellant's] brief").

IV. *Jury Instructions*

A. *Causation*

The University's next argument is that the district court, in its jury charge, improperly defined the required connection between an employer's discriminatory motive and the action taken against its employee. The relevant statutory language provides that it is unlawful for an employer to take an adverse employment action "because of" an individual's sex. 42 U.S.C. § 2000e-2; Mass. Gen.

L. ch. 151B, § 4. In a "pretext" case, such as here, a plaintiff who has shown that her sex was a "but for" cause of an adverse employment action has satisfied the statutory requirement of showing that the decision was "because of" her sex. *Price Waterhouse* v. *Hopkins*, 109 S. Ct. 1775, 1785 n.6 (1989). *See also Fields* v. *Clark University*, 817 F.2d 931, 935 (1st Cir. 1987) (mixed motive case) (citing *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273, 282 n.10 (1976)).[13]

The district court's jury instruction on causation included the following:

> Now, when I say in these questions [the special interrogatories]: Do you find that the Trustees refused to grant tenure *because of* sex or *because of* strike participation, or *because of* some combination

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[13] Justice Brennan's recent plurality opinion in *Price Waterhouse* v. *Hopkins*, 109 S. Ct. 1775 (1989), which addressed the proper causation standard in a "mixed motive" case, casts some doubt on the appropriate interpretation of *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976). In *McDonald*, the Court stated, in the context of a "pretext" case, that "no more is required to be shown than that race was a 'but for' cause." 427 U.S. at 282 n.10. Subsequent decisions of this court have read *McDonald* to hold that an employee must prove "but for" causation. *See Loeb* v. *Textron, Inc.*, 600 F.2d 1003, 1019 (1st Cir. 1979) (age discrimination) (followed in *Freeman* v. *Package Machinery Co.*, 865 F.2d 1331, 1335 (1st Cir. 1988) and *Menard* v. *First Security Services Corp.*, 848 F.2d 281, 285 (1st Cir. 1985)). The plurality opinion in *Price Waterhouse* says, however,

> [t]his passage [in *McDonald*] . . . does not suggest that the plaintiff *must* show but-for cause; it indicates only that if she does so, she prevails. More important, *McDonald* dealt with the question whether the employer's stated reason for its decision was *the* reason for its action; unlike the case before us today, therefore, *McDonald* did not involve mixed motives.

Price Waterhouse, 109 S. Ct. at 1785 n.6. Because it is not necessary to our decision in this case, we do not inquire whether, under *Price Waterhouse*, there are circumstances in which a "pretext" plaintiff could prevail if she proved something less than "but for" causation.

> of the above, I mean did that factor that I referred to *affect the result? Would the result have been different* if there had been no sex discrimination or no retaliation or no combination of the above procedure? That is to say, *did it bring about a difference in the resulting decision*?

(Emphasis added.) This instruction properly informed the jury that the plaintiff must show that but for the impermissible motive, the University would have granted tenure. *See, e.g., Geller* v. *Markham*, 635 F.2d 1027, 1035 (2d Cir. 1980) (age discrimination) ("If age discrimination was a 'factor . . . [which] made a difference,' then the employee's fortunes would have been 'different' without the discriminatory action and . . . discrimination was therefore a 'but for' cause of the result that did take place.").

The University has no quarrel with the above-quoted portion of the court's instruction. Instead, they direct our attention to a later portion of the instruction, in which the court said:

> Now, the law gives a great deal of discretion to the people in charge of a university. That is part of academic freedom also, that . . . we do not interfere in the freedom of the university as an institution, and that means the universities have the right to exercise independent judgment in choosing faculty and its decision must be respected unless *tainted* by one or more or both of the illegal reasons asserted by the plaintiff. . . .
>
> The University has the right to be wrong except in those two respects. They can make any kind of mistake except a decision that is *tainted* by sex discrimination or retaliation for strike activity, and your disagreement in general terms is not a basis for a finding for the plaintiff unless you find that the decision was effectively *tainted* by those two illegal considerations.

(Emphasis added.) The University asserts that the court's use of the word "taint" renders this portion of the instruction erroneous and prejudicial. The University claims that rather than describing a "but for" standard of causation, the district court's use of "taint" three times suggested to the jury that it could find for Brown if the University's tenure decision was "affected slightly" with sex discrimination.

"Our principal focus in reviewing jury instructions is to determine whether they tended to confuse or mislead the jury on the controlling issues." *Service Merchandise Company* v. *Boyd Corporation*, 722 F.2d 945, 950 (1st Cir. 1983) (citing *Green* v. *Edmands Company*, 639 F.2d 286, 289 (5th Cir. 1981); 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2558 at 668 (1971)). "On appeal, the charge must be examined as a whole; portions of it are not to be treated in isolation." *Id.* We agree with the University that a "tainted" decision is not necessarily one that would have been different "but for" the taint.[14] We do not think that in the context of the jury instruction as a whole, however, the district court's "taint" remarks confused the jury. First, the court correctly instructed the jury that the words "because of" in

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[14] "Taint" means "to touch or affect slightly with something bad or undesirable" or "to contaminate morally." *Webster's Third New International Dictonary* (1971). An employment decision impermissibly motivated by discrimination proscribed by Title VII can accurately be described as "tainted" or "infected" with discrimination. *See e.g.*, *Fields* v. *Clark University*, 817 F.2d 931, 932-33 (1st Cir. 1987) ("The [district] court found that the process by which plaintiff was denied tenure at Clark University was tainted with sexual discrimination"; also found decision was "impermissibly infected with sexual discrimination"). But an employment decision can be "tainted" with discrimination without the "taint" making a difference in the outcome. *See Price Waterhouse*, 109 S. Ct. at 1804 (O'Connor, J., concurring in judgment) (criticizing plurality opinion for appearing "to conclude that if a decisional process is 'tainted' by awareness of sex or race in any way, the employer has violated" Title VII).

the special interrogatories meant that the impermissible factors must have brought about "a difference in the resulting decision." Then, the court reiterated that "the plaintiff's burden here is that she has to prove—has to persuade you that it is more likely true than not true that she was denied tenure *because of* her sex or *because of* her strike activity or *because of* some combination of the two." (Emphasis added). The three "taint" remarks were contained in two paragraphs immediately following the above, which discussed not the meaning of 'because of," but described the university's prerogative to make bad, but not illegal, decisions.

Later in the instruction, in describing the law about "pretext," the court also stated three times that the jury's function was to determine whether the University's reason was so unworthy of belief that it was probable that one or more of the illegal reasons were the "true reasons" or "real reasons" for denying Brown tenure. The concept of a "true" or "real" reason suggests "but for" causation. The jury could not have decided that discrimination was the "true" reason for the University's decision without concluding that but for discriminatory animus the University would have made a different decision regarding tenure for Professor Brown.

The "taint" remarks were thus sandwiched between several statements which accurately defined the meaning of the words "because of" on the special interrogatory forms and several statements that sex must be the "true" or "real" reason for discrimination. In that context, we do not see a likelihood that the three references to "taint" confused or misled the jury with respect to the applicable causation standard.

B. *Jury's Role*

The University also complains that the district court's instructions encouraged the jurors to substitute their own judgment about the merit of Brown's tenure candidacy,

in contravention of *Kumar*, instead of merely deciding whether the University impermissibly discriminated against Brown. The University complains both that the jury charge implied that the jury was to determine whether Brown deserved tenure, and that the court refused to give a requested instruction which would have made clear for the jury its role in reviewing the evidence. We see no merit to either of these arguments.

First, the University complains about a portion of the jury instruction which included the following:

> Whether the plaintiff deserves tenure or not is not the test here, either. I would suppose that deserving people are sometimes awarded tenure and sometimes not. Certainly, before you get—that is not the full test; that is certainly one thing you have to consider. Obviously, if she didn't deserve tenure on any kind of objective basis, the university was quite right in turning her down. *If you find that she did deserve tenure*, she was qualified on an equal basis, then you have the question of whether she was turned down for one or two of these illegal reasons that I have mentioned. That is the key to the case.

(Emphasis added.) We agree that the court would have erred had it told the jury that it should find for Brown if it found that she deserved tenure. But this instruction did no such thing. On the contrary, it specifically states that "whether the plaintiff deserves tenure or not is not the test." The emphasized portion reinforces this by informing the jury that it is not enough to find that she deserved tenure, but rather the jury must find that she was denied tenure because of her sex and not simply because the University made a mistake. We think this instruction correctly stated the law.

The University also complains that the court erred by refusing to give a requested instruction. The omitted instruction was:

> In determining whether the reasons for the tenure decision are obviously weak or implausible, you should not attempt to determine whether the opinions of scholars are correct or incorrect. A university has the discretion to evaluate and weigh the opinions of scholars as it sees fit. As long as Boston University's evaluation of a candidate's scholarship is supported by some of the scholarly opinion submitted to it, the University's evaluation of the candidate's scholarship will not support a claim of discrimination.

We think the court could properly determine that the requested instruction, particularly the final sentence, went too far. It would virtually insulate the University from review of *any* tenure decision, including those based on impermissible discrimination. The district court gave several instructions, both during the trial and in the charge, that sufficiently advised the jury that it was not to substitute its own judgment on the merits of Brown's tenure candidacy for that of the University. "As long as the judge's instruction properly apprises the jury of the applicable law, failure to give the exact instruction requested does not prejudice the objecting party." *McKinnon* v. *Skil Corp.*, 638 F.2d 270, 274 (1st Cir. 1981) (quoted in *Service Merchandise Company, Inc.*, 722 F.2d at 950). This is, of course, especially so when the requested instruction is itself incorrect.

V. *The Contract Claim*

The University next argues that the district court erred in denying the University's motion to dismiss Brown's contract claim for lack of subject matter jurisdiction and in ruling that the contract gave Brown a judicially enforceable right to a discrimination-free tenure decision.

A. *Subject Matter Jurisdiction*

The University claims the district court lacked subject matter jurisdiction over Brown's claim that her tenure

denial violated the Agreement. This result follows the University argues, from a 1986 National Labor Relations Board ("Board") decision that the University need not bargain with the Chapter as its faculty members were "supervisors" rather than employees. This ruling, the University maintains, deprived the federal courts of subject matter jurisdiction under Section 301(a) of the National Labor Relations Act ("Act"), because the Agreement could no longer be regarded as is one between an employer and a labor organization representing employees.

This court recently has described the labor dispute at Boston University as follows:

> On October 18, 1974, the Union filed a petition for representation with the Board, seeking certification as the collective bargainng agent for a unit composed of all regular full-time faculty members at the University except for those in the Schools of Law, Dentistry and Medicine. The University objected to the appropriateness of the unit, alleging that the full-time faculty were excluded from coverage of the Act by virtue of either their supervisory or managerial status. Notwithstanding said objections, the Board ordered and held an election in which a majority of those employees presumably eligible voted in favor of being represented by the Union. . . . [T]he Union was certified by the Board as the bargaining representative of the unit sought.
>
> The Union's bargaining request was rejected by the University, leading to the filing of [unfair labor practice charges]. The [Board] . . . ordered [the University] to bargain with the Union. . . . [T]his court . . . affirmed the Board.

Boston University Chapter, American Association of University Professors v. *N.L.R.B.*, 835 F.2d 399, 400 (1st Cir. 1987) (footnotes omitted). The University faculty thereafter went out on strike, but the strike was settled on April 13, 1979, when the University and the Chapter

entered into the Agreement, which expressly was made "subject to the final disposition" of the case then pending in the courts.[15]

> On July 11, 1978, the University petitioned the Supreme Court for a writ of certiorari. On February 20, 1980, while [the] petition was still pending, the Supreme Court decided *N.L.R.B.* v. *Yeshiva University*, 444 U.S. 672 (1980), . . . which in substance holds that under given factual circumstances university faculty members shall be considered managerial employees excluded from coverage by the Act. On March 3, 1980 the University's petition was granted and the judgment of this court recalled and remanded for further consideration in light of the ruling in *Yeshiva. Trustees of Boston University* v. *N.L.R.B.*, 445 U.S. 912 (1980).

Id.

On April 17, 1981, following the procedure set out in the Agreement, the University informed Professor Brown that it was denying her tenure. Brown then filed this action in the Massachusetts Superior Court, alleging a breach of the Agreement. The University removed the action to federal district court, pursuant to Section 301 (a) of the Act, 29 U.S.C. § 185(a).[16] Brown subsequently

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[15] The Agreement provided:

> It is understood that the collective bargaining Agreement is subject to the final disposition of First Circuit Cases Numbers 77-1143, 77-1365, and 77-1226, now pending in the Supreme Court of the United States upon a petition of certiorari (No. 87-67). However, it is agreed that, by the execution of the settlement Agreement, neither party waives any of its rights with respect thereto; and it is further agreed that the foregoing does not prejudice the Chapter's right to claim that this agreement remains in effect for its duration.

[16] Federal subject matter jurisdiction over certain labor disputes is granted by the following:

> § 185 Suits by and against labor organizations
>
> Venue, amount, and citizenship

amended her complaint to include claims under Title VII and Chapter 151B.

On September 30, 1986, the Board ruled on remand from the Supreme Court that full-time faculty at Boston University are managers/supervisors, not employees subject to the Act, and dismissed the charge against the University. *Trustees of Boston University*, 281 N.L.R.B. No. 115, 123 L.R.R.M. 1144 (September 30, 1986). Almost a full year later, the jury trial in Brown's case took place. The jury returned a verdict for Brown on her contract claim on July 28, 1987. On September 22, 1987, before the district court had ruled on the Title VII and Chapter 151B claims, the University filed with the district court a motion to dismiss the contract claim for lack of subject matter jurisdiction. The University argued that since it was now evident that the Agreement was not a "contract between an employer and labor union representing employees," Section 301(a) no longer provided the district court with subject matter jurisdiction over Brown's contract claim. Moreover, the University argued, the district court was *forbidden* to enforce the contract, pursuant to Section 14(a) of the Act, which provides that "no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining." 29 U.S.C. § 164 (a) (1982).

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a).

On September 23, 1987, the district court denied the University's motion, ruling that since there was federal subject matter jurisdiction over Brown's Title VII claim, the court would exercise pendent jurisdiction over the contract claim, treating it as a Massachusetts state law claim. Soon thereafter, a panel of this court affirmed the Board's ruling that Boston University was not required to bargain with the Chapter. *See Boston University Chapter, American Association of University Professors* v. *N.L.R.B.*, 835 F.2d 399 (1st Cir. 1987). The time for the Chapter to petition the Supreme Court for a writ of certiorari expired in April, 1988.

In the present appeal, the University argues that the district court erred in exercising pendent jurisdiction over Brown's contract claim. We disagree. The district court plainly had federal question jurisdiction over Brown's Title VII claim. *See* 28 U.S.C. § 1331 (1982). A district court may exercise pendent jurisdiction over a state claim whenever it is joined with a federal claim which "derive[s] from a common nucleus of operative fact" and where the plaintiff "would ordinarily be expected to try [both the federal and state claims] in one judicial proceeding. . . ." *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 725 (1966). In this case, the state claim alleging violation of the anti-discrimination clause of the contract exactly paralleled the federal Title VII claim. It lay within the district court's discretion, therefore, to exercise pendent jurisdiction over Brown's contract claim.[17]

While apparently not contesting the preceding analysis, the University argues that the district court erred in enforcing the Agreement under state law. The University contends that Section 14(a) of the Act, by decreeing that

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[17] We need not determine whether the Board's reversal of its original determination that an employer must bargain with a union can oust a district court of subject matter jurisdiction that it had at the time the complaint was filed.

no employer "shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of *any* law" (emphasis added), bars enforcement of the Agreement in this court under either state or federal law, because it now has been determined that the Chapter is a "supervisors' union" rather than an "employees' union." Therefore, the argument goes, enforcement of the Agreement would compel the University (the employer) to deem the faculty (supervisors) as employees, in contravention of Section 14(a).

There may be force to this argument (although we do not decide), but the University has waived the argument by raising too late. The issue is not jurisdictional; rather its foundations rest on the contention that Brown failed to state a claim upon which relief can be granted. *See* Fed. R. Civ. P. 12(b)(6). Section 14(a) does not purport to divest federal and state courts of jurisdiction over claims against supervisors. Rather it merely forbids courts to order employers to deem as employees those who actually are supervisors. The University's argument is, therefore, that Brown brought her claim under an enenforceable agreement.

> [I]t is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy.

Bell v. *Hood*, 327 U.S. 678, 682 (1946) (quoted in *Brule* v. *Southworth*, 611 F.2d 406, 409 (1st Cir. 1979)).

Unlike a lack of subject matter jurisdiction—a defense that may be considered at any point in a judicial proceeding, *see* Fed. R. Civ. P. 12(h)(3),—the defense of failure to state a claim is normally waived if not raised

"at the trial on the merits" or before. Fed. R. Civ. P. 12 (h) (2) ("A defense of failure to state a claim upon which relief can be granted . . . may be made in any pleading . . . , or by motion for judgment on the pleadings, or at the trial on the merits."). Because the University did not raise the question whether Section 14(a) bars judicial enforcement of the Agreement until after the jury reached its verdict, it waived its right to assert this defense. *See Black, Sivalls & Bryson, Inc.* v. *Shondell*, 174 F.2d 587, 590-91 (8th Cir. 1949) (defendant who raises defense of failure to state a claim for first time in motion for judgment notwithstanding the verdict has waived that defense); *Brule* v. *Southworth*, 611 F.2d 406, 409 (1st Cir. 1979) (12(b)(6) defense cannot be raised for first time on appeal). *See also Snead* v. *Department of Social Services of City of New York*, 409 F. Supp. 995, 1000 (S.D.N.Y. 1975) ("the clear thrust of [Rule 12(h)(2)] is that a failure to state a claim may be raised at any time *before* a disposition on the merits but not *after*"), *vacated on other grounds*, 425 U.S. 457 (1976). *Cf. Sulmeyer* v. *Coca Cola Co.*, 515 F.2d 835, 846 (5th Cir. 1975) (a party who fails to raise issues "during the trial [is] not entitled to raise those issues in its motion for judgment n.o.v.").

The University argues that even if its argument is not jurisdictional, it preserved this defense by specifically raising the defense of failure to state a claim upon which relief can be granted in its answer to Brown's complaint. We disagree. A general defense that the complaint fails to state a claim ordinarily will not preserve unarticulated arguments in support of that defense. *See Smeed* v. *Carpenter*, 274 F.2d 414, 418 (9th Cir. 1960) ("The failure of appellee to bring to the trial court's attention the particulars upon which it relies in its assertion that the complaint failed to state a claim upon which relief could be granted constitutes a waiver of its right to rely on that defense."); *C. Albert Sauter Co., Inc.* v. *Rich-*

ard S. Sauter Co., Inc., 368 F. Supp. 501, 510-11 (E.D. Pa. 1973) (same). *Cf. Libertyville Datsun Sales* v. *Nissan Motor Corp.*, 776 F.2d 735, 737 (7th Cir. 1985) (where party raises specific argument for first time on appeal, it is waived even though "general issue" addressed by the argument was before the district court).

Although in unusual circumstances, we may reach issues not timely raised, there are no such circumstances here. *See In re Grand Jury Proceedings*, No. 88-2058, slip op. at 14 (1st Cir. May 19, 1989) (absent plain error, failure to raise objection in district court deprives appellant of right to raise matter on appeal) (citing *United States* v. *Griffin*, 818 F.2d 97, 99-100 (1st Cir.) *cert. denied*, 108 S. Ct. 137 (1987); *United States* v. *Krynicki*, 689 F.2d 289, 291 (1st Cir. 1981)). *See also Weaver* v. *Bowers*, 657 F.2d 1356, 1361-62 (3d Cir. 1981) (considered Rule 12(b)(6) motion, even though not raised until after trial, in the interests of "evenhandedness in the administration of justice"), *cert. denied*, 455 U.S. 942 (1982). We do not see plain error in the district court's exercise of pendent jurisdiction over Brown's contract claim. Nor are there any special circumstances here warranting deviation from our ordinary rule that, on appeal, we do not consider issues waived in the court below. On the contrary, it would be unjust to allow the University to prevail on the grounds asserted here. The Board's original order was vacated almost seven years before the trial on the merits in this case, and the Board definitively ruled that the University was not required to bargain with the union almost a full year before the trial. We can conceive of no legitimate reason for the University to have waited until the twelfth hour, *after* the jury reached a verdict against defendant on the claim in question, to move to dismiss on these particular grounds. The district court expressed outrage at the University's conduct, characterizing as "reprehensible" the actions of the University in waiting until after a long and expen-

sive trial to raise a "jurisdictional" issue, when the University had been aware of the Board's ruling for almost a year before trial. Like the district court, we do not condone delaying tactics of this sort. If the University preferred to go forward before a jury until after the jury decided against it, there is no injustice to making it abide by its choice. *See Brule*, 611 F.2d at 409 ("Defendants now wish to breathe new life into their waived defense of failure to state a claim by presenting it as a challenge to the court's subject matter jurisdiction—the latter being an issue which, of course, neither the parties nor the court could waive. We see no merit in this approach.").[18]

B. *Enforceability of the Agreement*

The University also argues that the Agreement itself precludes judicial review of a tenure decision. The district court ruled that Article XI of the Agreement, the "No Discrimination" provision, afforded Brown a judicially enforceable right to a discrimination-free tenure decision.[19] The district court reasoned that because the

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[18] The University suggests that it was inappropriate, under principles of comity, for the district court to have interpreted Brown's contract as a state common law claim over which it could assert pendent jurisdiction. The University grounds this argument in several Massachusetts court opinions which the University interprets as holding that common law discrimination claims may be barred by the Massachusetts anti-discrimination statute. We do not agree. The cases cited by the University, particularly *Mouradian* v. *General Electric Co.*, 23 Mass. App. 538, 503 N.E.2d 1318, *review denied*, 399 Mass. 1105, 507 N.E.2d 1056 (1987), indicate that the state court is hesitant to adopt *new* common law claims parallelling claims that can be brought under the state statutory scheme. The reasoning of these cases does not apply to a claim such as Brown's, which being brought under an express contractual provision could hardly be characterized as a new common law cause of action.

[19] The Agreement's Article XI provides:

> The Trustees, the Administration, the schools and departments of Boston University, and the Chapter shall practice no unlaw-

substance of a tenure decision is non-grievable, it would be superfluous to have included the non-discrimination clause if the parties had not intended to provide employees with a separate right to sue under the Agreement.

The University's argument on this appeal is grounded in Article V.C.8 of the Agreement, which provides that "The decision of the Trustees shall be final and not subject to the grievance procedure." The University argues that limitations on the arbitrability of a grievance, such as this, limit an employer's substantive obligation, and correspondingly limit the jurisdiction of a court over an action for breach of contract. The University finds further support for its position in Article II of the Agreement, which provides that the Trustees

> have full power and authority . . . to elect . . . professors . . . and to determine the duties, salaries, emoluments, responsibilities and tenures of their respective offices. . . . Except as delegated by the provisions of the Agreement for its terms, all rights, powers, privileges, duties, responsibilities, and authority are retained by the Trustees.

The University contends that these provisions indicate that the Trustees were to retain final authority in tenure decisions, and that these decisions were not to be subject to judicial review under the contract.

We express no view on these assertions as a matter of contract interpretation, because the University has waived this issue by raising it too late. Contrary to the University's assertion in its appellate brief, it did not raise this issue in its pre-trial motion for partial summary judgment. Although the University did argue on summary judgment that the contract did not create a

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ful discrimination on the basis of race, religion, national origin, sex, age, marital status, or physical handicap. Allegations of violations of this provision shall be directed to the appropriate governmental agency.

judicially-enforceable right to a discrimination-free tenure decision, it did so on grounds significantly different from those advanced before this court on appeal. In the motion for partial summary judgment, the University argued that Brown was not entitled to bring an action in court because she had failed to follow the grievance procedures delineated in the Agreement. The University argued forcefully that Brown's claim was *not* removed from the grievance procedure provided in the Agreement. The University also argued that Article XI, the "No Discrimination" provision, did not create a right to discrimination-free employment decisions that could be enforced through a breach of contract action, but rather embodied the parties' intention that discrimination claims would be channeled through the administrative procedures created by federal and state anti-discrimination statutes.

The University's present position, that the Agreement removes tenure decisions from the grievance mechanism and, a fortiori, precludes judicial review of those decisions, was first framed in the University's motion for judgment notwithstanding the verdict. As this argument is most aptly characterized as a motion to dismiss for failure to state a claim, the University waived its right to raise the issue by bringing it after "the trial on the merits." *Shondell*, 174 F.2d at 590-91; Fed. R. Civ. P. 12(h)(2). *See* Section V.A, *supra*.[20]

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[20] The University may also have been precluded from raising this issue by its failure to raise it in a motion for a directed verdict as required by Federal Rule of Civil Procedure 50. *See, e.g., Baskin v. Hawley*, 807 F.2d 1120, 1129-30 (2d Cir. 1986) ("Fed. R. Civ. P. 50(b) generally prohibits judgment n.o.v. on any ground not raised in a motion for a directed verdict."). The University's motion for a directed verdict did not rely on the grounds asserted here, but stated "Boston University also does not waive its contention that claims under the collective bargaining agreement are barred by plaintiff's admitted failure to complete the Agreement's grievance and arbitration procedure."

VI. *The Order to Grant Tenure*

We turn now to the matter of the district court's order that the University reinstate Brown with tenure. Courts have quite rarely awarded tenure as a remedy for unlawful discrimination, and those that have, have done so under circumstances distinguishable from those here.[21] The University argues that tenure is a significantly more intrusive remedy than remedies ordinarily awarded in Title VII cases, such as reinstatement or seniority, because a judicial tenure award mandates a lifetime relationship between the University and the professor. The University further contends that due to the intrusiveness of tenure awards and the First Amendment interest in academic freedom, a court should not award tenure unless there is no dispute as to a professor's qualifications. Thus, the University concludes, the district court should not have awarded tenure to Brown, because there existed a dispute as to her qualifications.

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[21] There are no cases, however, *denying* an award of tenure to a professor who has been found to be the victim of a discriminatory tenure decision.

Courts of appeals have upheld judicial tenure awards in two instances. In 1980, the Third Circuit upheld a conditional tenure award in *Kunda* v. *Muhlenberg College*, 621 F.2d 532 (3d Cir. 1980). The district court in *Kunda* had found that the college discriminated on the basis of sex against a female professor by denying her tenure because she did not have a master's degree, without telling her in advance that she needed one. The court of appeals upheld the district court's order that the professor be granted tenure if she obtained a master's degree within two years. In 1984, the Sixth Circuit upheld an order reinstating a professor, with tenure, to an institution which automatically awarded tenure after five years of successful teaching. *Ford* v. *Nicks*, 741 F.2d 858 (6th Cir. 1984). The professor in *Ford* had been discharged, after four years, in retaliation for helping his wife file a sex discrimination claim against the school. The University argues that *Kunda* and *Ford* are distinguishable on their facts from this case, because there was no dispute over the professors' qualifications, as there was over Brown's.

We agree that courts should be "extremely wary of intruding into the world of university tenure decisions," *Kumar*, 774 F.2d at 12, (Campbell, C.J., concurring). However, once a university has been found to have impermissibly discriminated in making a tenure decision, as here, the University's prerogative to make tenure decisions must be subordinated to the goals embodied in Title VII. The Supreme Court has ruled that the remedial provision of Title VII, 42 U.S.C. § 2000e5 (1982),[22] requires courts to fashion the most complete relief possible for victims of discriminatory employment decisions. *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 421 (1975). Once Title VII liability has been imposed, a court should deny "make whole" relief "only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." *Id.*

We see no reason to deny Brown such "make whole" relief here. We disagree with the University's characterzation of the tenure award as an infringement on its First Amendment right to determine for itself who may teach. In often-quoted language, Justice Frankfurter defined academic freedom as " 'an atmosphere in which there prevail the four essential freedoms of a university—to determine for itself *on academic grounds* who may teach,

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[22] The statute provides:

> If the court finds that the respondent has intentionally engaged in . . . an unlawful employment practice. . . , the court may . . . order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay. . . , or any other equitable relief as the court deems appropriate. . . . No order of the court shall require the admission or reinstatement of an individual . . . if such individual was . . . refused advancement . . . for any reason other than discrimination on account of race, color, religion, sex or national origin. . . .

42 U.S.C. § 2000e-5(g).

what may be taught, how it shall be taught, and who may be admitted to study.'" *Sweezy* v. *New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in result) (emphasis added) (quoting from a statement of a conference of senior scholars from the University of Cape Town and the University of the Witwatersrand, including A. v. d. S. Centlivres and Richard Feetham, as Chancellors of the respective universities). Academic freedom does not include the freedom to discriminate against tenure candidates on the basis of sex or other impermissible grounds. *See Powell* v. *Syracuse University*, 580 F.2d 1150, 1154 (2d Cir. 1978). Our decisions in this area have formulated a university's prerogatives similarly. While we have been and remain hesitant to interfere with universities' independent judgment in choosing their faculty, we have said that we will respect universities' judgment only "so long as they do not discriminate." *Kumar*, 774 F.2d at 12, (Campbell, C.J., concurring).

The University also argues that the special needs of academic institutions counsel imposition of less restrictive alternative remedies. However, the University suggests none. Some *amici* suggest that Brown be reinstated for a three year probationary period, or be subjected to a non-discriminatory tenure decision. Aside from the impracticality of the latter, well over eight years after the original decision, these suggestions fall far short of remedies which will make Brown whole. According to the jury's verdict, she was offered the three year extension *because* of discrimination. The jury found that, "but for" sex discrimination, Brown would immediately have been granted tenure. Awarding her tenure is the only way to provide her the most complete relief possible. *See Albemarle Paper Co.*, 422 U.S. at 421.

The conclusion that tenure is an appropriate Title VII remedy is borne out by the statute's legislative history. In 1972, Congress both amended the remedial portion of Title VII, granting courts broad discretion to fashion

"make whole" remedies, and removed the then-existing Title VII exemption for educational institutions. A Congressional report notes, "women have long been invited to participate in the academic process, but without the prospect of gaining employment as serious scholars." H.R. Rep. No. 238, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Admin. News 2137, 2154-55. The process of becoming a "serious scholar" necessarily includes a fair opportunity to become tenured, because tenure serves to ensure academic freedom, by allowing " 'a faculty member to teach, study, and act free from a large number of restraints and pressures which otherwise would inhibit independent thought and action.' " Note, *Tenure and Partnership As Title VII Remedies*, 94 Harv. L. Rev. 457, 474 & n.104 (1980) (quoting C. Byse & L. Joughin, *Tenure in American Higher Education* 2 (1959)). Thus, to deny tenure because of the intrusiveness of the remedy and because of the intrusiveness of the remedy and because of the University's interest in making its own tenure decisions would frustrate Title VII's purpose of "making persons whole for injuries suffered through past discrimination." *Albemarle Paper Co.*, 422 U.S. at 421. We add that Brown's near unanimous endorsement by colleagues within and without her department suggest strongly that there are no issues of collegiality or the like which might make the granting of tenure inappropriate.

VII. *The Injunction Against Further Discrimination*

The final issue raised on appeal regards the district court's order that "[t]he defendant is enjoined from discrimination on the basis of sex with respect to the appointment, promotion and tenure of faculty members, and in particular with respect to the promotion, salary or other benefits to which the plaintiff may become entitled." The University argues that the injunction is overbroad insofar as it enjoins the University from sex discrimination against faculty other than Professor Brown, because it is

tantamount to an injunction to "obey the statute," which the Supreme Coure rejected as too broad in *N.L.R.B.* v. *Express Publishing Co.*, 312 U.S. 426 (1941). The hazard of such an injunction, warns the University, is that the order has the potential to further embroil the courts in the University's internal affairs, allowing faculty members to circumvent administrative procedures by simply invoking the contempt jurisdiction of the district court whenever a dispute arises.

We agree. An injunction should be narrowly tailored to give only the relief to which plaintiffs are entitled. *See Califano* v. *Yamasaki*, 442 U.S. 682, 702 (1979). Ordinarily, classwide relief, such as the injunction here which prohibits sex discrimination against the class of Boston University faculty, is appropriate only where there is a properly certified class. *See Zepeda* v. *United States I.N.S.*, 753 F.2d 719, 727-28 & n.1 (9th Cir. 1983). Of course, "[a]n injunction . . . is not necessarily made overbroad by extending benefit or protection to persons other than prevailing parties in . . . [a] lawsuit—even if it is not a class action—if such breadth is necessary to give prevailing parties the relief to which they are entitled." *Professional Association of College Educators, TSTA/NEA* v. *El Paso County Community College District*, 730 F.2d 258, 273-74 (5th Cir.) (citing *Meyer* v. *Brown & Root Construction Co.*, 661 F.2d 369, 374 (5th Cir. 1981); *Gregory* v. *Litton Systems, Inc.*, 472 F.2d 631, 633-34 (9th Cir. 1972)), *cert. denied*, 469 U.S. 881 (1984). But there is no such reason here for an injunction running to the benefit of nonparties. Professor Brown's case established that she alone had been the victim of sex discrimination. The only permissible focus of the injunctive relief, therefore, would be on protecting her from further instances of sex discrimination or retaliation. That portion of the injunction which provides that "[t]he defendant is enjoined from discrimination on the basis of sex with respect to . . . promotion, salary or

other benefits to which the plaintiff may become entitled" provides her with the outer limit of the relief to which she is entitled.[23] That portion of the injunction which provides that the University "is enjoined from discrimination on the basis of sex with respect to the appointment, promotion and tenure of faculty members" is overbroad, and is vacated.

CONCLUSION

The jury's finding of liability and the district court's order that Boston University reinstate Julia Prewitt Brown as an associate professor with tenure are affirmed. That part of the injunction which ran to the benefit of Boston University faculty other than Professor Brown is vacated, but the portion prohibiting sex discrimination against Professor Brown is affirmed.

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[23] We do not agree with the University that the injunction is overbroad by virtue of protecting Brown from discrimination with respect to promotion, salary or other benefits. Although Brown established only that she was the victim of a discriminatory tenure decision, the district court has "broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future, unless enjoined, may fairly be anticipated from the defendant's conduct in the past." *N.L.R.B.* v. *Express Publishing Co.*, 312 U.S. 426, 435 (1941). Sex discrimination with respect to promotion, salary and other benefits is "of the same type or class as" sex discrimination with respect to tenure.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 88-1288

JULIA PREWITT BROWN,
Plaintiff, Appellee,

v.

TRUSTEES OF BOSTON UNIVERSITY,
Defendant, Appellant.

JUDGMENT

Entered: December 1, 1989

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The findings of liability and the district court's order that Boston University reinstate Julia Prewitt Brown as an associate professor with tenure are affirmed. That part of the injunction which ran to the benefit of Boston University faculty other than Professor Brown is vacated, but the portion prohibiting sex discrimination against Professor Brown is affirmed in accordance with the opinion issued this day.

By the Court:

/s/ Francis P. Scigliano
Clerk

[cc: Messrs, Strauss, Beach, Steinbach, Sullivan and Ms's Rudavsky, Valdez and Gray]

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 88-1288

JULIA PREWITT BROWN,
Plaintiff, Appellee,

v.

TRUSTEES OF BOSTON UNIVERSITY,
Defendant, Appellant.

Before

Campbell, *Chief Judge*,
Breyer and Torruella, *Circuit Judges*

MEMORANDUM AND ORDER

Entered January 24, 1990

Upon consideration of Boston University's petition for rehearing, it is ordered that the petition be denied.

The University makes three arguments in its petition. First it argues that the court failed to consider the cumulative effect of four evidentiary errors by the district court, as well as the effect of a ruling by the district court which we stated may have been error, but if so then harmless. Contrary to the University's contention, the court has already considered the collective impact of these rulings and concluded that the University

was not prejudiced. Although the opinion did not expressly state that the cumulative impact of the errors would in all likelihood have not affected the jury verdict, we obviously implied this. In each case, the opinion stated essentially that any effect on the jury would be negligible.

The University's second argument has to do with whether the district court properly allowed the breach of contract claim to go to the jury. In the *Brown* opinion, we declined to address the University's argument that by removing tenure from the grievance procedure, the collective bargaining agreement not only shielded tenure decisions from being grieved but also from judicial review. We based our refusal to consider the argument upon the University's failure to raise it prior to its motion for Judgment NOV. The University does not now protest our decision on this point. However, it asserts that we improperly failed to address a separate argument, to wit, the argument that Article XI of the Agreement (relied on by Brown and the district court as the basis for a contractual right against sex discrimination) did not create a private contractual right against discrimination, but merely acknowledged the statutory rights of aggrieved faculty to take their claims to appropriate federal and state agencies.

Although the University's petition for rehearing now quotes from the University's appellate briefs in a manner suggesting that, in fact, it did make this argument on appeal, when the quotes are read in context (particularly note 19 in the original brief), they appear to be merely a gloss on the primary argument—that by removing tenure decisions from the grievance procedure, the Agreement had precluded judicial review of tenure decisions—rather than a separate argument. This primary argument, as indicated above, we declined to review because it was not timely raised in the district court.

Upon a second look, we remain doubtful that the University's cursory statement in a footnote in its original brief and its "elaboration" in its reply brief, preserved, as a separate point, the argument that Article XI of the Agreement only referenced statutory discrimination remedies. *See, e.g., Pignons S.A. de Mecanique* v. *Polaroid Corp.*, 701 F.2d 1, 3 (1st Cir. 1983) ("In preparing briefs and arguments, an appellee is entitled to rely on the content of an appellant's brief for the scope of the issues appealed, and appellant generally may not preserve a claim merely by referring to it in a reply brief or at oral argument.").

We further note that this argument was not presented to the district court when the University moved for a directed verdict. The University *did* make the argument earlier, in its pre-trial motion for partial summary judgment, but failed to renew it in its motion for a directed verdict. Instead, in the latter motion, the University substituted an inconsistent argument to the effect that Brown was barred from suing under the Agreement because she had not exhausted the Agreement's grievance procedure. This replacement of an earlier argument with an inconsistent one would suggest to a district judge that the University had abandoned the former. Coupled with the apparent abandonment is the fact that by failing to present the argument in the directed verdict motion, the University lost the right to rely on it in seeking a Judgment NOV. *See Brown*, slip op. at 60 n.20. Under all these circumstances, we disagree that this argument is now properly before us. *See generally*, 4 C.J.S., Appeal and Error § 253, at 770 ("a party seeking correction of error must stand or fall on the case which was made in the trial court, and thus it follows that only those objections or grounds of objection which were urged in the trial court, without change and without addition, will be considered on appeal."). *Cf. Hale* v. *Firestone Tire & Rubber Co.*, 756 F.2d 1322, 1333-34 (8th Cir. 1985) (party whose motion in limine is denied

must renew objection at trial and renewal of objection on different grounds does not preserve issue for appellate review).

The University's third argument is that this court erred in holding that the University had waived its argument that section 14(a) of the NLRA [1] barred enforcement of the Agreement under either state or federal law by not raising it until after the trial.

The University argues that since the district court did not treat the contract claim as a *state* contract claim until after the jury verdict, it had neither reason nor opportunity to raise its section 14(a) defense prior to that time. The problem with this argument is that the University had ample reason and opportunity to raise this defense prior to trial. The University's argument—that enforcement of the Agreement would effectively compel the University to treat individuals defined as supervisors as employees, in violation of section 14(a)—did not depend on the classification of the breach of contract claim as a state law action. As stated in its original brief, the University's argument was that "*any* exercise of federal court jurisdiction to enforce the Agreement relied upon by Brown would be contrary to the injunction of Section 14(a) of the Act." (emphasis in original). Thus, the University's section 14(a) defense was available against enforcement of the Agreement under either state or federal law as soon as it became clear that the University's faculty were supervisors—either in 1980 when the Supreme Court decided *NLRB* v. *Yeshiva University*, 444 U.S. 672 (1980), or at least in 1986 when the NLRB ruled in *Trustees of Boston*

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[1] Section 14(a) provides in part,

> no employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

29 U.S.C. § 164(a).

University, 281 N.L.R.B. No. 115, that the University's faculty are supervisors. *See Brown*, slip op. at 49-50, 56.

The University also argues that its defense that section 14(a) preempts state law is jurisdictional and therefore cannot be waived. The *Brown* opinion addressed and rejected this argument. However, the University has embellished its argument by asserting that under *International Longshoremen's Association* v. *Davis*, 476 U.S. 380 (1986), preemption under the National Labor Relations Act "is in the nature of a challenge to the Court's power to adjudicate that may be raised at any time."

Despite this gloss on the argument, it remains without merit. In *Davis*, the Court did not hold that all preemption under the NLRA is jurisdictional; it held only that *Garmon* preemption is jurisdictional. *Garmon* preemption derives from *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), in which the Court held that where a dispute involves "activity [that] is arguably subject to § 7 or § 8 of the [National Labor Relations] Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of interference with national policy is to be averted." *Id.* at 245. The Court explained in *Davis* that *Garmon* preemption "rest[s] on a determination that in enacting the NLRA Congress intended for the Board generally to exercise exclusive jurisdiction in this area." 476 U.S. at 391. The Court further explained that "If there is preemption under *Garmon*, then state jurisdiction is extinguished." *Id.* Thus, the Court concluded, *Garmon* preemption cannot be waived and must be addressed whenever it is raised.

The *Davis* Court made clear, however, that its holding is limited to disputes over which Congress intended to give the NLRB exclusive jurisdiction.

> [T]his conclusion [that *Garmon* pre-emption is jurisdictional] derives from congressional intent as

> delineated in our prior decisions. Thus, our decision today does not apply to preemption claims generally but only to those preemption claims that go to the State's actual adjudicatory or regulatory power as opposed to the State's substantive laws. The nature of any specific pre-emption claim will depend on congressional intent in enacting the particular pre-emption statute.

476 U.S. at 391 n.9. The University's argument is not that the NLRB has exclusive jurisdiction over this dispute. Indeed, since faculty members have been deemed supervisors and not employees, the NLRB plainly would *not* have jurisdiction over the disputes between the University and a member of its faculty. The University's argument is simply that enforcement of the Agreement would violate section 14(a). Thus, the argument would at best establish that section 14(a) preempts state substantive law by rendering the Agreement unenforceable; it would not establish that section 14(a) preempts state or federal court jurisdiction. Accordingly, the argument is not jurisdictional and is not appropriately addressed at this late stage of the lawsuit. *See Johnson* v. *Armored Transport of California, Inc.*, 813 F.2d 1041, 1043-44 (9th Cir. 1987) (argument that section 301 of the Labor Management Relations Act preempted state law wrongful discharge claim affects only choice of law and not choice of forum and therefore was subject to waiver); *Reithmiller* v. *Blue Cross & Blue Shield of Michigan*, 824 F.2d 510, 512 (6th Cir. 1987) ("Plaintiff's argument [that state court's jurisdiction was pre-empted by ERISA] reflects a misunderstanding of the distinction between pre-emption of a state's substantive law and pre-emption of a state court's power to adjudicate.").

Petition Denied.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 88-1288

JULIA PREWITT BROWN,
Plaintiff-Appellee,

v.

TRUSTEES OF BOSTON UNIVERSITY,
Defendant, Appellant.

Before

Campbell, *Chief Judge,*
Breyer and Torruella, *Circuit Judges*

MEMORANDUM AND ORDER

Entered January 24, 1990

Upon consideration of Boston University's petition for rehearing, it is ordered that the petition be denied.

The University makes three arguments in its petition. First it argues that the court failed to consider the cumulative effect of four evidentiary errors by the district court, as well as the effect of a ruling by the district court which we stated may have been error, but if so then harmless. Contrary to the University's contention, the court has already considered the collective impact of these rulings and concluded that the University was not prejudiced. Although the opinion did not expressly state that the cumulative impact of the errors would in all likelihood have not affected the jury verdict, we ob-

viously implied this. In each case, the opinion stated essentially that any effect on the jury would be negligible.

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Although the University's petition for rehearing now quotes from the University's appellate briefs in a manner suggesting that, in fact, it did make this argument on appeal, when the quotes are read in context (particularly note 19 in the original brief), they appear to be merely a gloss on the primary argument—that by removing tenure decisions from the grievance procedure, the Agreement had precluded judicial review of tenure decisions—rather than a separate argument. This primary argument, as indicated above, we declined to review because it was not timely raised in the district court.

Upon a second look, we remain doubtful that the University's cursory statement in a footnote in its original brief and its "elaboration" in its reply brief, preserved, as a separate point, the argument that Article XI of the Agreement only referenced statutory discrimination rem-

edies. *See, e.g., Pignons S.A. de Mecanique* v. *Polaroid Corp.*, 701 F.2d 1, 3 (1st Cir. 1983) ("In preparing briefs and arguments, an appellee is entitled to rely on the content of an appellant's brief for the scope of the issues appealed, and appellant generally may not preserve a claim merely by referring to it in a reply brief or at oral argument.").

We further note that this argument was not presented to the district court when the University moved for a directed verdict. The University *did* make the argument earlier, in its pre-trial motion for partial summary judgment, but failed to renew it in its motion for a directed verdict. Instead, in the latter motion, the University substituted an inconsistent argument to the effect that Brown was barred from suing under the Agreement because she had not exhausted the Agreement's grievance procedure. This replacement of an earlier argument with an inconsistent one would suggest to a district judge that the University had abandoned the former. Coupled with the apparent abandonment is the fact that by failing to present the argument in the directed verdict motion, the University lost the right to rely on it in seeking a Judgment NOV. *See Brown*, slip op. at 60 n.20. Under all these circumstances, we disagree that this argument is now properly before us. *See generally* 4 C.J.S., Appeal and Error § 253, at 770 ("a party seeking correction of error must stand or fall on the case which was made in the trial court, and thus it follows that only these objections or grounds of objection which were urged in the trial court, without change and without addition, will be considered on appeal."). *Cf. Hale* v. *Firestone Tire & Rubber Co.*, 756 F.2d 1322, 1333-34 (8th Cir. 1985) (party whose motion in limine is denied must renew objection at trial and renewal of objection on different grounds does not preserve issue for appellate review).

The University's third argument is that this court erred in holding that the University had waived its argument

that section 14(a) of the NLRA [1] barred enforcement of the Agreement under either state or federal law by not raising it until after the trial.

The University argues that since the district court did not treat the contract claim as a *state* contract claim until after the jury verdict, it had neither reason nor opportunity to raise its section 14(a) defense prior to that time. The problem with this argument is that the University had ample reason and opportunity to raise this defense prior to trial. The University's argument—that enforcement of the Agreement would effectively compel the University to treat individuals defined as supervisors as employees, in violation of section 14(a)—did not depend on the classification of the breach of contract claim as a state law action. As stated in its original brief, the University's argument was that "*any* exercise of federal court jurisdiction to enforce the Agreement relied upon by Brown would be contrary to the injunction of Section 14(a) of the Act." (emphasis in original). Thus, the University's section 14(a) defense was available against enforcement of the Agreement under either state or federal law as soon as it became clear that the University's faculty were supervisors—either in 1980 when the Supreme Court decided *NLRB* v. *Yeshiva University*, 444 U.S. 672 (1980), or at least in 1986 when the NLRB ruled in *Trustees of Boston University*, 281 N.L.R.B. No. 115, that the University's faculty are supervisors. *See Brown*, slip op. at 49-50, 56.

The University also argues that its defense that section 14(a) preempts state law is jurisdictional and therefore

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[1] Section 14(a) provides in part,

> no employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

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cannot be waived. The *Brown* opinion addressed and rejected this argument. However, the University has embellished its argument by asserting that under *International Longshoremen's Association* v. *Davis*, 476 U.S. 380 (1986), preemption under the National Labor Relations Act "is in the nature of a challenge to the Court's power to adjudicate that may be raised at any time."

Despite this gloss on the argument, it remains without merit. In *Davis*, the Court did not hold that all preemption under the NLRA is jurisdictional; it held only that *Garmon* preemption is jurisdictional. *Garmon* preemption derives from *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), in which the Court held that where a dispute involves "activity [that] is arguably subject to § 7 or § 8 of the [National Labor Relations] Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of interference with national policy is to be averted." *Id.* at 245. The Court explained in *Davis* that *Garmon* preemption "rest[s] on a determination that in enacting the NLRA Congress intended for the Board generally to exercise exclusive jurisdiction in this area." 476 U.S. at 391. The Court further explained that "If there is preemption under *Garmon*, then state jurisdiction is extinguished." *Id.* Thus, the Court concluded, *Garmon* preemption cannot be waived and must be addressed whenever it is raised.

The *Davis* Court made clear, however, that its holding is limited to disputes over which Congress intended to give the NLRB exclusive jurisdiction.

> [T]his conclusion [that *Garmon* pre-emption is jurisdictional] derives from congressional intent as delineated in our prior decisions. Thus, our decision today does not apply to pre-emption claims generally but only to those pre-emption claims that go to the State's actual adjudicatory or regulatory power as opposed to the State's substantive laws. The nature

> of any specific pre-emption claim will depend on congressional intent in enacting the particular pre-emption statute.

476 U.S. at 391 n.9. The University's argument is not that the NLRB has exclusive jurisdiction over this dispute. Indeed, since faculty members have been deemed supervisors and not employees, the NLRB plainly would *not* have jurisdiction over disputes between the University and a member of its faculty. The University's argument is simply that enforcement of the Agreement would violate section 14(a). Thus, the argument would at best establish that section 14(a) preempts state substantive law by rendering the Agreement unenforceable; it would not establish that section 14(a) preempts state or federal court jurisdiction. Accordingly, the argument is not jurisdictional and is not appropriately addressed at this late stage of the lawsuit. *See Johnson* v. *Armored Transport of California, Inc.*, 813 F.2d 1041, 1043-44 (9th Cir. 1987) (argument that section 301 of the Labor Management Relations Act preempted state law wrongful discharge claim affects only choice of law and not choice of forum and therefore was subject to waiver); *Reithmiller* v. *Blue Cross & Blue Shield of Michigan*, 824 F.2d 510, 512 (6th Cir. 1987) ("Plaintiff's argument [that state court's jurisdiction was pre-empted by ERISA] reflects a misunderstanding of the distinction between pre-emption of a state's substantive law and pre-emption of a state court's power to adjudicate.").

Petition Denied.

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 81-2589-S

DR. JULIA PREWITT BROWN,
Plaintiff,

v.

TRUSTEES OF BOSTON UNIVERSITY,
Defendant

MEMORANDUM ON PLAINTIFF'S CLAIMS UNDER TITLE VII OF THE CIVIL RIGHTS ACT AND M.G.L. c. 151B AND ORDER FOR JUDGMENT

November 5, 1987

SKINNER, D.J.

This case went to trial before a jury on Count I of the complaint and a verdict was returned for the plaintiff in the amount of $200,000. This verdict was accompanied by the jury's answer to a special interrogatory which reflected a finding that the plaintiff had been denied tenure because of sex-based discrimination. This finding is binding on the court with respect to its finding on the remaining counts of the complaint alleging claims under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e and the state civil rights act, M.G.L. c. 151B, which were tried to the court. *Curtis v. Loether*, 415 U.S. 189, 196 n.11 (1974).

The jury's finding is determinative of liability under these two statutes; there remains only considerations of

the relief to be awarded. The plaintiff seeks reinstatement in tenured status as an associate professor of English, immediate promotion to a full professor, a paid sabbatical, and an order for the defendant to make retirement contributions equivalent to the contributions which would have been made had she been awarded tenure at the proper time. She seeks damages for emotional distress under M.G.L. c. 151B, an order requiring non-discriminatory treatment in future promotions and an order requiring public posting of the result in this case.

A. *Reinstatement*

The parties agree, correctly, that the question of reinstatement is addressed to the sound direction of the court. It is a fairly common remedy in non-academic situations. Because of the special responsibility of university trustees and the lifetime span of academic tenure, our court of appeals has warned us to be more circumspect in tenure cases than in other cases. *Kumar v. Board of Trustees, University of Massachusetts*, 774 F.2d 1 (1st Cir. 1985). But we are not to avoid our responsibilities under the statute out of undue deference to university administrations. *Sweeney v. Board of Trustees, Keene State College*, 569 F.2d 169, 176 (1st Cir.), *vacated and remanded on other grounds*, 439 U.S. 24 (1978).

In my view, the statutory mandate to give complete relief would best be served by an order requiring reinstatement as a tenured associate professor in the absence of a compelling reason to the contrary. It would not appear from evidence in this case that Professor Brown would encounter such hostility on her return as would interfere with her productive life at the university. She apparently is well regarded by her academic colleagues. Insulation from retaliation by the administration can be provided by an appropriate order of this court. There seems little risk that Boston University will be stuck with an unqualified person on its faculty, judging from the

evidence in the case, although there was some dispute as to the quality of her scholarship. This case is distinguishable in this respect from my resolution of this issue in *Fields v. Clark University*, 40 FEP 670 (D. Mass), reversed with respect to allocation of burden of proof, 817 F.2d 931 (1st Cir. 1987).

Accordingly, an order shall enter requiring the Trustees of Boston University to reinstate the plaintiff as an associate professor of English, with tenure.

B. *Damage for Emotional Distress*

In my opinion, damages for emotional distress may be recovered under M.G.L. c. 151. *Bournewood Hospital, Inc. v. M.C.A.D.*, 371 Mass. 303, 358 N.E.2d 235 (1976); *College-Town, Division of Interco, Inc.* v. *M.C.A.D.*, 400 Mass. 156, —— N.E.2d —— (1987). I do not read into these decisions any restriction to a case involving extreme conduct nor do I think that the distinction noted between sections 5 and 9 of c. 151B require treatment of privately instituted cases with respect to these damages that is any different than the treatment of cases instituted by MCAD.

The damages awarded in these cases have been very modest. Our court of appeals has approved of the award of substantial damages for emotional distress in an employment case brought under 42 U.S.C. § 1981, but there was evidence of harassment of the plaintiff for a period of years. *Rowlett v. Anheuser-Busch, Inc.*, —— F.2d —— (1st Cir. 1987), slip opinion September 30, 1987.

I would suppose the usual rules governing damages would apply. For instance, it is reasonably predictable that denial of tenure will cause the applicant emotional distress. I conclude that part of the emotional distress in this case was a facet of the plaintiff's highly strung personality and her highly developed expectations for herself. But it is also a general rule of damage that a defendant takes the plaintiff as she is, and takes the risk

that she may be unusually susceptible to particular sorts of harm. On the other hand, denial of tenure is a well-known risk of academic life, and may be visited on extremely qualified applicants for a variety of reasons, including the quality of the competition, the need of the institution for the applicant's specialty and budgetary constraints. The defendant was also entitled to expect some degree of emotional preparedness for such an eventuality.

There were no extreme circumstances. In fact, the defendant offered to soften the blow by giving the plaintiff an additional three-year contract. The plaintiff, however, considered this an additional insult.

Testimony on emotional distress was offered by the plaintiff herself and her therapist, a psychologist, whom she had consulted for a variety of problems before the denial of tenure. There was evidence of a period of depression resulting from the denial of tenure. These two witnesses also extended the area of damage to the plaintiff's unsatisfactory relationship with her first child, who was born during the pendency of the tenure controversy. The plaintiff was then in the middle of an acrimonious dispute with her first husband, which led to a divorce. Many parents find difficulty with a first child under the best of circumstances. In the midst of this marital discord it is no surprise that the child was unhappy, a circumstance that in my view should not be charged to Boston University.

An award of damages for emotional distress is necessarily imprecise. I award damages in the amount of $15,000, with interest from the date of the filing of the complaint in accordance with the Massachusetts rule.

C. *Other Claims for Relief*

The plaintiff has requested various other benefits, such as immediate promotion to full professor, a year's paid

sabbatical right off the bat upon reinstatement, additional payments into her pension fund, continued supervision and posting.

In my view, the extremely generous award of the jury plus reinstatement plus damages for emotional distress constitute sufficient relief in this case. Granting of a sabbatical and promotion to full professor would be an interference by the court in the administration totally unwarranted by the evidence in this case. No posting is required. This case has received extensive publicity locally and nationally, and particularly in the academic community. In an abundance of caution, however, I will include in this order a prohibition against future discriminatory conduct in general and in particular with reference to the plaintiff.

A final judgment shall be entered in accordance with the foregoing, and with the jury's award on Count I of the complaint. The plaintiff shall recover her reasonable attorneys' fees and expenses of suit.

/s/ [Illegible]
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 81-2589-S

DR. JULIA PREWITT BROWN,
Plaintiff,

v.

TRUSTEES OF BOSTON UNIVERSITY,
Defendant

FINAL JUDGMENT

November 5, 1987

SKINNER, D.J.

This cause came on for trial by jury on Count I and by the court on Counts III and IV, and in accordance with the jury's verdict on Count I and the memoranda of the court heretofore filed, it is ordered, adjudged and decreed as follows:

1. The plaintiff shall have judgment of the defendant in the amount of $200,000 plus interest (according to the Massachusetts rule) and costs on Count I of the complaint.

2. The defendant shall reinstate the plaintiff as a tenured associate professor of English at Boston University beginning with the academic year 1988-9 under Count III of the complaint.

3. The plaintiff shall have judgment of the defendant, in addition to the foregoing, in the amount of $15,000, plus interest from the date of filing of

the complaint in accordance with the Massachusetts rule, on Count IV of the complaint.

4. The defendant is enjoined from discrimination on the basis of sex with respect to the appointment, promotion and tenure of faculty members, and in particular with respect to the promotion, salary or other benefits to which the plaintiff may become entitled.

5. The plaintiff shall be awarded her reasonable attorneys' fees and expenses of suit.

/s/ [Illegible]
United States District Judge

No. 89-1680

In The

Supreme Court of the United States

October Term, 1989

TRUSTEES OF BOSTON UNIVERSITY,

Petitioner,

v.

JULIA PREWITT BROWN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF IN OPPOSITION FOR THE RESPONDENT

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RESPONDENT'S STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Whether a federal court may, as an appropriate exercise of its discretion to remedy violations of Title VII, award tenure to a Title VII plaintiff whose tenure application was rejected by a university's president and trustees because of her sex.

2. Whether, in a civil case, a "beyond a reasonable doubt" standard of harmless error analysis should be applied to evidentiary errors involving university administrators' public comments on topics of general or academic interest, where it is offered that such errors may have a chilling effect on these individuals' speech.

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BRIEF IN OPPOSITION FOR THE RESPONDENT

STATEMENT OF THE CASE

This case arises out of the denial of tenure to Julia Prewitt Brown ("Brown"), an assistant professor of English Literature, by the petitioner, Trustees of Boston University. Brown's amended complaint as tried in the district court included three counts, Count I for breach of a provision of a collective bargaining agreement barring discrimination, Count II for violation of Title VII of the 1964 Civil Rights Act, 42 U.S.C. 2000e *et seq.*, and Count III for violation of the state anti-discrimination law, Mass. G.L. c. 151B.

Count I of the complaint was tried to a jury, which found that the Trustees had denied Brown tenure because of her sex[1] and awarded monetary damages. The court adopted the jury's findings as to issues common to Count I and Counts II and III. Thereafter, in addition to awarding monetary damages,[2] the court ordered Brown's reinstatement to Boston University as a tenured associate professor.

The Trustees appealed to the First Circuit Court of Appeals, raising challenges to the district court's jurisdiction, evidentiary rulings, jury instructions, and remedy. The court of appeals rejected several of these arguments because the Trustees had failed to raise them in a timely fashion. It agreed that certain of the district court's evidentiary rulings were in error, but in each case found the error to be harmless. Pet. App. 20a-23a, 26a-29a. After evaluating the various evidentiary challenges, the court of appeals concluded that Brown had made a showing of discriminatory treatment "so compelling as to permit a reasonable finding of one-sidedness going beyond a mere difference in judgment," and that a reasonable jury could properly have found that "the denial of tenure to Brown was 'manifestly' unequal" given the evidence of Boston University's tenure standards and awards of tenure to similarly situated male faculty. *Id.* at 18a-19a.[3] It also

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[1] The jury also found that the Trustees had not retaliated against Brown for her participation in a faculty strike, a second aspect of her contract claim.

[2] The district court also ordered other equitable and compensatory relief not presently at issue.

[3] Petitioner's twelve-page statement of the case in its petition mischaracterizes the evidence introduced at trial and

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ruled that tenure was the only remedy which would not perpetuate the past discrimination, because Boston University's offer to extend Brown's contract and reconsider her for tenure had itself been held to be discriminatory. *Id.* at 49a.

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dwells on matters not relevant to the petition, essentially repeating arguments raised unsuccessfully in the court of appeals and not pressed here, in an apparent effort either to call into question the finding of liability or to predispose the Court against Brown on the question of the remedy of tenure.

For example, the petition states (Pet. 9) that at trial Brown "presented the jury with evidence to demonstrate the strength of her qualifications for tenure" relying "in substantial part" on the testimony of two colleagues (Professors Goodheart and Craddock) whose testimony involved opinion evidence later deemed improperly admitted. The implication is that the bulk of Brown's case consisted of improperly admitted evidence. This is untrue in two respects: the central body of evidence Brown presented consisted of *comparative* evidence regarding Brown's qualifications and those of male faculty awarded tenure, *see* Pet. App. 11a-12a, 18a; and although Professors Goodheart and Craddock testified at great length, the court of appeals found that only two lone remarks were improperly admitted, and that these were repetitive of other properly admitted evidence. *Id.* at 21a-23a.

Similarly, petitioner maligns Brown for being the only tenure candidate between 1979 and 1985 to have rejected a three year extension of contract in lieu of tenure (Pet. 7, n.4), neglecting to mention that three faculty committees emphatically rejected the appropriateness of a contract extension as an alternative to tenure in her case before she responded to the offer. Pet. App. 7a-8a.

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The court of appeals affirmed the district court's tenure award as an instance of the appropriate exercise of courts' "broad discretion to fashion 'make whole' remedies" for violations of Title VII. *Id.* at 49a-50a. Contrary to petitioner's assertion, the court of appeals did not establish an automatic entitlement to a judicial award of tenure to all Title VII plaintiffs who successfully challenge a tenure denial, but rather addressed the particulars of plaintiff's case.

Petitioner requested rehearing on three grounds, two of which the court of appeals rejected as untimely raised. *Id.* at 55a-59a. The court of appeals also rejected the remaining argument, that the court failed to consider the cumulative effect of four evidentiary errors, including the two errors that are the subject of the second question raised in the instant petition. Stating that it had held in each case "essentially that any effect on the jury would be negligible," the court of appeals explained that the cumulative impact of the errors "would in all likelihood have not affected the jury verdict." *Id.* at 55a. The Trustees made no argument regarding the standard to be

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The list of irrelevant matters in petitioner's statement could go on to include petitioner's recitation of its other evidentiary arguments rejected by the court of appeals, its selective quotations from the tenure file and from the district court's jury instructions, its gratuitous comments on the significance of various items of trial evidence, and its suggestion of impropriety in the jury's deciding issues common to the legal and equitable claims. These matters are not properly before this Court. As is apparent from its lengthy opinion, the court of appeals carefully and thoroughly reviewed each of the Trustees' arguments before affirming the finding of liability.

applied to evidentiary errors potentially implicating constitutional rights.

REASONS TO DENY THE PETITION

Although petitioner claims otherwise, the decision below awarding tenure as a remedy for a discriminatory denial of tenure does not present a conflict with the decision of the Sixth Circuit or any other circuit court. The First Circuit did not issue a blanket rule mandating that tenure be awarded as the required remedy in such cases, but merely approved the district court's tenure award as an appropriate exercise of discretion. The Sixth Circuit's guidelines for tenure cases would allow for a similar remedy on facts paralleling those in Brown's case. Pp. 6-15, *infra*.

Nor does the tenure award infringe upon any constitutional right of petitioner, since the findings below establish that petitioner's denial of tenure to Brown was based on her sex, and that petitioner's defense based on Brown's supposedly inadequate scholarship was a pretext for discrimination. There is no constitutional right to discriminate, under the guise of "academic freedom" or otherwise. Pp. 15-18, *infra*.

This case is not a proper vehicle for this Court's consideration of the standard to be applied in civil cases to the analysis of harmless errors in a district court's rulings which may implicate constitutional rights. That issue is untimely raised for the first time in the petition for a writ of certiorari. Moreover, any burden that may be placed on constitutional rights on the facts presented

below is incidental and speculative, and is not buttressed by any finding that a violation of constitutional rights occurred. Finally, the issue of the proper harmless constitutional error standard in civil cases has not given rise to any reported decisions, much less a conflict among the lower courts, and is therefore not the sort of significant issue that would warrant the Court's attention at this time. Pp. 18-22, *infra*.

In sum, the decision below raises no issue on which there is a clear conflict among the circuits or other lower courts. Nor does it raise any issue of a pressing nature, such as might now justify review by this Court. Rather, the decision below is a careful and correct application of well-settled law to the particular facts of the case before it.

I. THE DECISION OF THE FIRST CIRCUIT COURT OF APPEALS DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER COURT

A. The First Circuit Stated No General Rule Requiring Tenure

The First Circuit's decision below does not state a general rule that tenure should be conferred on every Title VII plaintiff who successfully challenges a tenure denial. Rather, it addresses the particular remedy fashioned by the district court in response to the specific facts of Brown's case. Pet. App. 47a-50a.[4] The Court's words

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[4] Notably, the First Circuit stated that "The conclusion that tenure is *an* appropriate Title VII remedy is borne out by the statute's legislative history." Pet. App. 49a (emphasis

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are as follows (with emphasis on Brown supplied): "We turn now to the matter of the district court's order that the University reinstate *Brown* with tenure." *Id.* at 47a. "We see no reason to deny *Brown* such 'make whole' relief here." *Id.* at 48a. "Some *amici* suggest that *Brown* be reinstated for a three year probationary period, or be subjected to a nondiscriminatory tenure decision. . . . [T]hese suggestions fall short of remedies which will make *Brown* whole. According to the jury's verdict, *she* was offered the three year extension *because* of discrimination. The jury found that, 'but for' sex discrimination, *Brown* would immediately have been granted tenure. Awarding *her* tenure is the only way to provide *her* the most complete relief possible." *Id.* at 49a. "We add that *Brown's* near unanimous endorsement by colleagues within and without her department suggests strongly that there are no issues of collegiality or the like which might make the granting of tenure inappropriate." *Id.* at 50a.

The decision does nothing more than approve the district court's exercise of its unquestioned discretion, *see Franks v. Bowman Transportation Co.*, 424 U.S. 747, 763-64 (1976); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 424-25 (1975), to formulate an appropriate remedy for proven discrimination.[5] But, by quoting the First Circuit as

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supplied). The court of appeals did not say tenure is *the* only appropriate remedy where a plaintiff proves that he or she was denied tenure because of discrimination, and in fact suggested the contrary in intimating that "issues of collegiality or the like . . . might make the granting of tenure inappropriate" on different facts. *Id.* at App. 50a.

[5] The district court noted in its decision that "the parties agree, correctly, that the question of reinstatement is addressed

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supposedly having said that "[a]warding [a successful Title VII complainant] tenure is the *only* way to provide her the most complete relief possible" (*see* Pet. 19) – where the Court of Appeals never spoke of the generic "successful Title VII complainant" but only of Brown herself (*see* Pet. App. 49a) – petitioner fabricates a general rule where none exists.

B. Even Under the Sixth Circuit's Guidelines, Brown Was Entitled to Tenure as a Remedy

There is no conflict between the First Circuit's approval of a tenure award for Brown and the guidelines issued by the Sixth Circuit, because Brown's is the sort of exceptional case contemplated by those guidelines. In the First Circuit, any tenure case which survives the court of appeals' review is exceptional, since the court of appeals' requirements for a finding of liability in a tenure challenge are so demanding. In fact, Brown is the first prevailing plaintiff in a First Circuit tenure case to have survived the court of appeals' review. *See Kumar v. Board of Trustees*, 774 F.2d 1 (1st Cir. 1985), *cert. denied*, 475 U.S. 1097 (1986) (reversing district court decision that university discriminated); *Fields v. Clark University*, 817 F.2d 931 (1st Cir. 1987) (vacating reinstatement of professor and order of new tenure review where district court had misplaced burden on plaintiff to prove that absent discrimination she would have been tenured, where case

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to the sound discretion of the court. . . . [O]ur court of appeals has warned us to be more circumspect in tenure cases than in other cases." Pet. App. 67a.

involved direct evidence of discrimination). The Sixth Circuit announced its guidelines for equitable remedies for prevailing plaintiffs seeking tenure in a case markedly different from *Brown* both in its procedural posture and its facts. In *Gutzwiller v. Fenik*, 860 F.2d 1317 (6th Cir. 1988), the court of appeals reversed the ruling of a district court that had not only failed to award tenure, but had also erroneously declined to adopt for purposes of Title VII liability a binding jury verdict finding liability for discrimination under 42 U.S.C. § 1983. 860 F.2d at 1333. Thus, unlike the First Circuit in *Brown*, the Sixth Circuit was not called upon to evaluate the propriety of an existing tenure award.

The facts in *Gutzwiller* virtually invited the remedy of reinstatement and a new tenure review by an impartial faculty committee. There the only discriminatory actors were two faculty members at the department level (860 F.2d at 1325-27); the school's administrators were found not to have discriminated. *Id.* at 1323-24. Furthermore, a faculty grievance committee, which agreed that the plaintiff's tenure review had been conducted unfairly, recommended that she be reinstated for a year and reviewed again by a newly constituted committee. *Id.* The facts in *Gutzwiller* appropriately convinced the Sixth Circuit that the plaintiff there might be able to receive a fair review if the case were reconsidered by the university. Nonetheless, the Court of Appeals acted cautiously in leaving the determination of the likelihood of fairness to the trial court. *Id.* at 1333.

The factual background of Brown's case differs significantly both as to the locus of the discrimination and

the extent of her favorable support.[6] Brown was fully and favorably reviewed at five of the seven levels of the tenure process.[7] The departmental faculty committee voted for her by a vote of 22-0, an unusual show of strength in that department. Pet. App. 5a, 12a n.6. The college-wide faculty committee recommended her unanimously. *Id.* at 5a. The dean recommended her for tenure (with reservations). *Id.* at 6a. The university-wide faculty committee recommended tenure by a vote of 9-2. *Id.* at 6a-7a. The provost then offered a three year contract extension followed by a new tenure review, an offer that, according to university procedures, required the concurrence of all the faculty committees as well as the candidate. Each of the three faculty committees unanimously rejected the provost's extension offer and reasserted in each case the propriety of an immediate tenure award. *Id.* at 7a-8a. The provost then offered to promote Brown to associate professor if she would accept an extension of

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[6] Petitioner dissimulates by stating (Pet. 17) that *Gutzwiller* involved "a factual record virtually identical to the record in this case." The only factual similarity between the two cases is that each of the plaintiffs was held to a higher standard than her male counterparts in being expected to publish a second book in order to earn tenure. *See Gutzwiller*, 860 F.2d at 1321, 1326, and *Brown*, Pet. App. 7a.

[7] In this respect Brown differs significantly from the plaintiff in *Fields v. Clark University*, 40 Fair Employment Practices Cases 670 (D. Mass. 1986), *rev'd on other grounds*, 817 F.2d 931 (1st Cir. 1987), upon which petitioners mistakenly rely for the proposition that Brown should have been reinstated without tenure. Pet. 19 n.16. In *Fields*, the district judge found direct evidence of discrimination; however, he did not grant tenure since he was not convinced that but for the discrimination the plaintiff would have been tenured. 40 F.E.P. at 672.

contract rather then tenure. When this offer was rejected by the department and Brown herself, the provost recommended that tenure be denied. *Id.* at 8a.

The case then went to a committee of three scholars expert in Brown's field from outside Boston University, who voted in favor of tenure by a vote of 2-1. *Id.* Under the tenure process in effect at Boston University, this committee of outside experts was only called upon in cases where the provost had declined to follow the uniform recommendation of the college and university-wide faculty committees. *Id.* It therefore functioned as an outside, impartial referee, although its recommendation did not bind the president or Trustees. Despite this committee's positive vote, the president recommended a denial of tenure, and later denied an appeal by Brown. The Trustees accepted his recommendation.[8] *Id.* at 10a. At trial, the president took the stand to justify his negative judgment. The jury ruled that the negative tenure decision constituted discrimination.

Unlike *Gutzwiller, Brown* is not fairly amenable to a remand to the university. The individual whose actions effected the discrimination, President Silber, remains as president. It would be futile to return Brown's case to him for reconsideration. *See Kunda v. Muhlenberg College,* 621 F.2d 532, 549 (3d Cir. 1980) (noting "the impossibility of asking the Board to ignore . . . the intangible effect upon [the tenure] decision because the candidate being considered was a successful party to a Title VII suit"). If

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[8] It was undisputed at trial that the Trustees invariably accept the president's recommendation. *See* joint appendix in the court of appeals at 457-58.

the president's vote were to be disregarded, the outcome would be a positive tenure award, based on the recommendation of the ad hoc committee at the penultimate level of review, which was consistent with all but one of the prior judgments in Brown's case.[9] Therefore, a further review would serve no purpose.

The Sixth Circuit in *Gutzwiller* stated that in most instances, courts should defer to the decision of "academic professionals." 860 F.2d at 1333. In Brown's case, the unbiased "academic professionals" had already spoken clearly and consistently prior to the court action.[10]

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[9] In this respect, the district court's award of tenure should more accurately be characterized not as an award imposed from outside, but as a judicial undoing of the acts of discrimination previously superimposed upon the institution's established process to reach the outcome that would have resulted absent the unlawful discrimination. *See Kunda v. Muhlenberg College*, 621 F.2d 532, 549 (3d Cir. 1980) ("the trial judge's finding [regarding the plaintiff's qualifications] was based not on his independent judgment, but on the judgment of the university community itself. . . . The court did not *award* Kunda tenure. The court instead attempted to place plaintiff in the position she should have been 'but for' the unlawful discrimination").

[10] Brown notes that, although the Sixth Circuit did not identify the "academic professionals" it had in mind, other courts, including this Court, have often referred to faculty as the individuals to whom courts should generally defer where academic judgment is at issue. *See, e.g., Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 225 (1985) ("judges . . . should show great respect for the faculty's professional judgment") (case involving evaluation and dismissal of student); *Namenwirth v. Board of Regents*, 769 F.2d 1235, 1243 (7th Cir. 1985), *cert. denied*, 474 U.S. 1061 (1986) (referring to the

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The Sixth Circuit's guidelines, which were crafted in response to a situation where the tenure review process had gone awry at the very earliest stage, cannot properly be applied as petitioner would have it, to deprive these professionals of their voice favoring tenure in the very different setting of Brown's case. Both because of the thoroughness of her tenure review prior to the discriminatory judgment, and because of the near-uniformity of support she received for tenure until that judgment,[11] Brown's is a case where the court's award of tenure is appropriate.

C. The Tenure Remedy is in Accord with Established Precedent

Given the particular factual background in *Brown*, it is hard to conceive of an appropriate remedy other than

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evaluation of tenure candidates by "an experienced faculty committee"); *Kunda v. Muhlenberg College, supra*, at 548 (" . . . faculty has at least the initial, if not the primary, responsibility for judging candidates"): *Johnson v. University of Pittsburgh*, 435 F. Supp. 1328, 1346 (W.D. Pa. 1977) (" . . . the peer review system has evolved as the most reliable method for promotion of the candidates best qualified to serve the needs of the institution").

[11] Petitioner contends that the Sixth Circuit's view would preclude a judicial award of tenure whenever "academic qualifications are fairly in dispute." Pet. 16-17. Nothing in *Gutzwiller* warrants this statement; the Sixth Circuit's guidelines turn solely on the likelihood of fair reconsideration. Even if the guidelines turned on whether a tenure candidate's qualifications were disputed, in the instant case, those evaluators who fairly evaluated Brown did not dispute her qualifications, notwithstanding petitioner's selective and distorted recitation of the contents of the tenure file.

tenure. The First Circuit considered and rejected alternatives suggested to it, noting that

> The University also argues that the special needs of academic institutions counsel imposition of less restrictive alternate remedies. However, the University suggests none. Some *amici* suggest that Brown be reinstated for a three year probationary period, or be subjected to a non-discriminatory tenure decision. Aside from the impracticality of the latter, well over eight years after the original decision, these suggestions fall far short of remedies which will make Brown whole. According to the jury's verdict, she was offered the three year extension *because* of discrimination. The jury found that, "but for" sex discrimination, Brown would immediately have been granted tenure. Awarding her tenure is the only way to provide her the most complete relief possible. *See Albemarle Paper Co.*, 422 U.S. at 421. Pet. App. 49a.

This result is in full accord with this Court's precedents. *Franks v. Bowman Transportation Co., supra.*

Petitioner also relies on *Ford v. Nicks*, 866 F.2d 865 (6th Cir. 1989), where, following *Gutzwiller*, the Sixth Circuit disapproved a district court's award of tenure to a faculty member who was not rehired after her first year of teaching because of sex discrimination. Even absent the guidelines of *Gutzwiller*, the court's ruling was proper, since the plaintiff had completed only one year of teaching, had not completed her tenure track probationary period, and had not undergone any portion of a tenure review. *Cf. Briseno v. Central Technical Community College Area*, 739 F.2d 344 (8th Cir. 1984) (tenure improperly awarded as remedy for discriminatory failure to rehire part-time faculty member as full-time employee;

court modifies relief to reinstatement in full-time probationary position). That tenure was an inappropriate remedy in two failure-to-rehire cases hardly proves that tenure is an inappropriate remedy on the very different facts of Brown's case.

The First Circuit's decision is unlikely to affect Title VII jurisprudence in the university context. Since 1972, when Title VII's coverage was extended to universities, only four plaintiffs have succeeded in proving that they were denied tenure because of unlawful discrimination.[12] Where the liability threshold is so high, the choice of remedy in a single case – within the range of the court's discretion – is unlikely to affect many individuals and does not warrant this Court's attention.

II. THE TENURE AWARD TO BROWN DOES NOT INFRINGE UPON ANY FIRST AMENDMENT RIGHT OF PETITIONER

Petitioner claims that by ordering tenure as a remedy, the First Circuit infringed on Boston University's First Amendment academic freedom right to determine whom to employ, and that the tenure remedy is not narrowly tailored to serve a compelling government interest. When petitioner made this argument below, the First Circuit

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[12] In addition to Brown and the plaintiffs in *Gutzwiller, supra,* and *Kunda, supra,* the plaintiff in *Planells v. Howard University,* 32 Fair Employment Practices Cases 336 (D.D.C. 1983), proved he was a victim of "reverse discrimination" in being denied reappointment and promotion to associate professor on the basis of his race. He was reinstated and promoted to associate professor with tenure pursuant to a consent judgment. 34 Fair Employment Practices Cases 66, 67 (D.D.C. 1984).

rejected the notion that legitimate academic judgments were involved in the denial of tenure to Brown, because the jury had found that Brown's tenure application had been denied because of her sex. Academic freedom is only at issue when a university bases its decision "on academic grounds," Pet. App. 48a, the court of appeals explained, and

> [a]cademic freedom does not include the freedom to discriminate against tenure candidates on the basis of sex or other impermissible grounds. *See Powell v. Syracuse University*, 580 F.2d 1150, 1154 (2d Cir. 1978). . . .While we have been and remain hesitant to interfere with universities' independent judgment in choosing their faculties, we have said that we will respect universities' judgment only "so long as they do not discriminate." App. 49a (citation omitted).

In the face of the First Circuit's clear and unexceptionable statement of the controlling legal principles, petitioner suggests that the law was somehow modified by *University of Pennsylvania v. E.E.O.C.*, ___ U.S. ___, 110 S.Ct. 577 (1990), because of a question purportedly left open there. Pet. 22. However, the matter of tenure as a remedy did not arise in *University of Pennsylvania*; much less was it left open. Rather, the clear rule that this Court established there is that universities will receive no special treatment when allegations of unlawful discrimination are involved: "The effect of the elimination of this exemption [for educational institutions from Title VII] was to expose tenure determinations to the same enforcement procedures applicable to other employment decisions." 110 S. Ct. at 583.

To the extent that petitioner's appeal to *University of Pennsylvania* can be understood as a request that the Court now define "the precise contours of any academic-freedom right against government attempts to influence the content of academic speech through the selection of faculty," *id.* at 586, that request should be rejected as inapposite to any question raised in this case. There has been no allegation here that the First Circuit's action in ordering tenure for Brown was intended to or would influence "the content of university discourse toward or away from particular subjects or points of view," *id.* at 587, or that it had any purpose other than to make Brown whole. As the Court pointed out in *University of Pennsylvania*, its concern in the seminal "academic freedom" cases was government attempts "to control or direct the *content* of the speech engaged in by the university or those affiliated with it." *Id.* at 586. It can just as fittingly be said of the First Circuit's tenure award as of the E.E.O.C.'s subpoenas of tenure documents that

> [the Court of Appeals] is not providing criteria that petitioner *must* use in selecting teachers. Nor is it preventing the University from using any criteria it may wish to use, except those – including race, sex and national origin – that are proscribed under Title VII. *Id.* at 587.

More to the point, even if, in the absence of discrimination, a university is deemed to have a First Amendment right to select faculty, the principle that government must narrowly tailor its action where it infringes upon an interest protected by the First Amendment does not apply where, as here, the asserted interest has been found to be a pretext for discrimination.

In short, nothing about this case raises any question not answered clearly and unequivocally in *University of Pennsylvania, supra*. A case which merely presents recently-visited legal issues in a slightly different but conceptually equivalent factual setting does not warrant this Court's review.

III. THE ISSUE OF A "BEYOND A REASONABLE DOUBT" HARMLESS ERROR STANDARD IN CIVIL CASES IS NOT PROPERLY BEFORE THE COURT AND DOES NOT WARRANT THIS COURT'S REVIEW

Petitioner next seeks review on the asserted grounds that this case raises an issue of whether a heightened harmless error standard should be applied to constitutional errors in civil cases, claiming that the court of appeals found constitutional error in this case; that the court found such error to be harmless under a civil preponderance of the evidence standard; and that this Court should review whether constitutional error in civil cases should be deemed harmless only when the court considers it so beyond a reasonable doubt.

Petitioner's argument fails. First, no issue regarding the harmless error standard was presented to or decided by the district court or the court of appeals. Petitioner's briefs to both lower courts – including its brief in support of its motion for judgment notwithstanding the verdict, its appeal, and its petition for rehearing – are wholly silent on this issue, citing only harmless error precedents from various courts of appeal which raise no question

about the standard to be applied.[13] *See* App. A-C. The issue was not raised below and consequently ought not to be heard for the first time here. *See, e.g., Berkemer v. McCarty*, 468 U.S. 420, 443 (1984); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n. 2 (1970).

Second, the premise for petitioner's argument is lacking: there has been no determination in this case that any error infringed petitioner's constitutional rights. Petitioner claims that the court of appeals found that it was an error of constitutional dimension to admit into evidence two remarks by University administrators, and that admitting the remarks into evidence violated petitioner's academic freedom. But this is not so. Rather, the court of appeals merely noted its "*fear* [of] the chilling effect that admission of such remarks *could* have on academic freedom." Pet. App. 27a (emphasis supplied).

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[13] The only references in the briefs below to harmless error do not discuss the issue of the harmless error standard at all. In petitioner's brief regarding its only post-trial motion relating to liability, its Motion for Judgment Notwithstanding the Verdict, harmless error is not mentioned. *See* Appendix A hereto. In petitioner's brief to the First Circuit (which substantially reproduced the JNOV memorandum on this issue), five pages are spent on the two purported errors now characterized as achieving constitutional dimension, but that discussion lacks any mention of the proper standard to be applied to harmless error analysis. *See* Appendix B hereto. Finally, in petitioner's Petition for Rehearing to the First Circuit, although petitioner goes into great detail regarding its disagreement with the court of appeals on the alleged errors in question, including an argument why the supposed errors are not harmless, the issue of the applicable standard is again conspicuously absent. *See* Appendix C hereto.

The court of appeals' prudential concern about potential curtailment of academic speech in the abstract does not constitute a finding that the admission of the evidence in fact deprived any defendant of academic freedom. This case thus contrasts sharply with those cases in which analysis of harmless constitutional error issues was successfully sought from this Court. *Cf. Chapman v. California*, 386 U.S. 18, 20-21 (1967) (Court found petitioner suffered denial of Fifth and Fourteenth Amendment rights at trial); *Rose v. Clark*, 478 U.S. 570, 575 (1986) (same). Indeed, petitioner itself claimed to the court of appeals no more than a risk that admission of the evidence would chill academic freedom.[14] *See* App. B.

In the absence of any determination that petitioner's constitutional rights were violated, there was no occasion for the lower courts to decide any question regarding the harmless constitutional error standard. Moreover, given that there has been no finding of constitutional error, there is no basis for this court to review the suppositional statements in the opinion of the court of appeals. *See Federal Communications Commission v. Pacifica Foundation*,

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[14] It is doubtful that a constitutional right is implicated here in any event. Petitioner asserted to the court of appeals that the evidentiary use of remarks by tenure evaluators would chill academic freedom by discouraging them from openly expressing their views on controversial subjects. App. B. There is no assertion here that there has been any direct attempt by the government to control the content of any speech, however, and petitioner's argument appears no different than the academic freedom claim rejected in *University of Pennsylvania v. E.E.O.C., supra*, 110 S.Ct. at 585-588, a decision which was not available to the court of appeals when it rendered its opinion in this case.

438 U.S. 726, 734 (1978) (Court reviews judgments, not statements in opinions).

Finally, the question whether a "beyond a reasonable doubt" standard should be applied to constitutional errors in civil cases is not a serious and important issue demanding this Court's review by certiorari. There is no split of authority between the circuits on this issue. Indeed, petitioners make no such claim. In fact, no court or commentator has intimated a view on this question, or so much as suggested that a heightened harmless error standard should be adopted regarding constitutional error in civil cases.[15] While it may be an interesting intellectual proposition, it is at best an academic query, not an important issue affecting other litigants or the public. *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955) (certiorari not granted to satisfy intellectual interest in the abstract regarding episodic issues or questions which are not of significant general importance).

In short, on the question of the harmless error standard, the petition seeks to raise an issue which is not properly before this Court, does not legitimately arise

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[15] Petitioner claims that Professors Wright and Miller argue for the adoption in civil cases of the harmless constitutional error standard applied in criminal cases. In reality, the authors in 1973 no more than noted the possibility of such a development shortly after *Chapman v. California*, 386 U.S. 18 (1967), was decided. Neither at that time nor since has their treatise advocated any position on this issue. *See* 11 C. Wright and A. Miller, *Federal Practice and Procedure: Civil* (1973) § 2883. Aside from the reference to Wright and Miller, petitioner cites no other court or commentator that has discussed this issue; respondent is aware of none.

from the decisions below, and is not of such primacy to warrant review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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May 24, 1990

APPENDIX A

EXCERPT FROM MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR, IN THE ALTERNATIVE, FOR A NEW TRIAL (pp. 20-26)

A. Evidence of President Silber's views concerning the effect of working parents on the family should not have been admitted.

Over Boston University's objection (Tr. XII 70, 73, 76-77), Brown was permitted to introduce a segment of a 1984 speech given by President Silber in which he expressed various opinions about the decline of the family, including his views that "a single-parent family is likely to provide a far poorer environment for the initiation and sustenance of children," and that "in a two-parent family when both parents are at work there is less likelihood of providing an environment that encourages education – much less than in a two-parent family in which one parent remains at home for the nurture of the children, to devote himself or herself full time to their care, feeding and education." Pl. Ex. N. This evidence should have been excluded, pursuant to Fed. R. Evid. 401 and 403.

The Court admitted President Silber's remarks on the theory that they evidenced a "general atmosphere of discrimination."[3] (Tr. II 71-75). But as *Kumar* made clear,

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[3] The phrase "general atmosphere of discrimination" derives from *Sweeney v. Board of Trustees of Keene State College*, 604 F.2d 106 (1st Cir. 1979), *cert. denied*, 44 U.S. 1045 (1980). However, in *Hooker v. Tufts University*, 581 F.Supp. 98, 100 (D. Mass. 1985), Judge Nelson ruled that the concept refers to "general information about the *treatment* of women at the institution, in

(Continued on following page)

there "has to be a limit to reliance on pure atmospherics. We require, and are expected to require, evidence of discrimination that 'stands up in a court of law.' " 774 F.2d at 12. Not only were President Silber's remarks incapable of demonstrating a discriminatory attitude on his part, much less a "general atmosphere of discrimination" at Boston University, but such remarks were highly likely to confuse and mislead the jury.

President Silber's remarks on their face are gender-neutral. The remarks did not single out women – the "blame," according to President Silber for providing a less than ideal educational environment fell equally on both parents or on the single parent regardless of sex. Moreover, President Silber did not propose that women refrain from working in order to devote themselves full-time to the care of their children. On the contrary, he testified that his proposed solution was a dramatic improvement in government sponsored day care services. Only by indulging in speculation could a juror have inferred that President Silber's remarks revealed a hidden sexist agenda of impeding the access of women to the workforce. In short, the remarks were plainly irrelevant to the issue of whether President Silber sought to deny tenure to Brown because of her sex.

The admission of President Silber's remarks was highly prejudicial to the University. The views President

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(Continued from previous page)

order to suggest a discriminatory climate." *Id.* at 100 (emphasis added). Clearly, evidence of President Silber's *opinions* on the impact of working parents on child rearing does not bear on the *treatment of women at Boston University.*

Silber expressed are not universally shared. Some jurors, especially the female jurors, may well have interpreted his speech as an accusation that working women make inadequate parents, and thereby may have taken offense. Indeed, plaintiff's counsel thus interpreted the speech in her closing, arguing that President Silber

> bemoans the deterioration of three branches of society; the family, the church and the school. Who is to blame for the deterioration of the family? Well, women of course, single mothers and working mothers because mothers are out working instead of staying home with their children.

Tr. XIII 36.

The admission of evidence of a speech on unconnected policy matters for purposes of supporting a claim of discriminatory animus on the part of the speaker is particularly disturbing in the university context. One of the most important functions of a university is to foster a spirited and free-wheeling debate about controversial matters of moral and political concern. The role of university presidents, unlike their corporate counterparts, is integrally related to the fostering of this debate. *See Kunda v. Muhlenberg College*, 621 F.2d 532, 547 (3rd Cir. 1980). The admission as evidence of a speech concerning a debatable topic, purportedly to show an ideological taint, will necessarily discourage university presidents, other university officials, faculty members on tenure committees, and the myriad others who participate in tenure and promotion decisions from making any statement which, in another context – such as that of this case – may be viewed as insufficiently "progressive," or as unpopular with a particular audience. The risk of chilling such

speech, particularly in an academic setting, independently mandated the rejection as evidence of President Silber's remarks. *Cf. Redgrave v. Boston Symphony Orchestra*, 393 Mass. 93, 502 N.E.2d 1375 (1987) (suggesting that exercise of constitutional rights of free speech cannot constitute evidence of interference with the rights of another).

B. Evidence concerning the Women's Studies Program at Boston University should not have been admitted.

Again over Boston University's objection (Tr. IX 46), Brown introduced evidence that the University did not provide the degree of support for a Women's Studies Program that members of the Women's Studies Committee sought, and that Dean Bannister had "reservations about the academic orientation of women's Studies" (Pl. Ex. K). Brown did not contend that the level of funding for Women's Studies affected the University's need for her services.[4] Instead, Brown apparently sought admission of this evidence as a general indication of an institutional unresponsiveness to issues affecting women. This evidence, however, was not sufficiently related to Brown's tenure case to justify its admission, especially in light of its potentially prejudicial nature.

First, the fact that the advocates of a particular program desired greater funding for the program than it received proves nothing. The task of an administrator is

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[4] Such a contention would have been untenable, as Brown taught only one course which could be used to satisfy the Women's Studies minor.

to balance such claims on the University's limited resources against requests advanced with equal fervor by supporters of other programs. Secondly, even if the funding decision reflected Dean Bannister's reservations about the program's "academic orientation," such reservations simply do not translate into a hostility to female scholars themselves or a desire to limit their opportunities to pursue the fields of academic endeavor supported by the University. Congress has passed no law stating that universities must establish women's studies programs or must fund such programs at any particular level. Disagreements about the importance of particular courses or subjects simply do not illuminate the motives underlying a tenure decision. As stated in *Langland v. Vanderbilt University*, 589 F.Supp. 995, 1006 (M.D. Tenn. 1984) *aff'd without op.*, 772 F.2d 907 (6th Cir. 1985), which also involved claims of sex discrimination in the denial of tenure:

> Whatever the opinion of this or any other court may be as to the importance of women's studies to a college curriculum, it is not the judiciary's function to advise university officials what to teach. *See Lynn*, [656 F.2d] n.5, at 1343. *See generally Faro v. New York University*, 502 F.2d 1229 (2d Cir. 1974). An inference of discrimination may not be drawn from a judgment that one department or program is more deserving of funds than another, especially where, as here, there are insufficient resources to meet all the university's needs.

The proper approach to evidence of this type was taken in *Hooker v. Tufts University*, 581 F.Supp. 98 (D. Mass. 1983). *Hooker* involved a claim of sex discrimination in the denial of tenure to a female physical education

instructor who sought to introduce evidence of Tufts' failure to upgrade its physical education program as required by Title IX. Although the evidence sought to be introduced involved the failure to meet *statutory standards* of nondiscrimination in the *very* program in which the plaintiff sought tenure, the court held that the evidence was inadmissible, because the plaintiff established no "nexus between funding compliance and tenuring of women faculty." *Id.* at 102.

In the instant case, Brown established no nexus between the University's funding for Women's Studies and its tenuring of women faculty generally. Moreover, unlike the situation in *Lynn v. Regents of the University of California*, 656 F.2d 1337 (9th Cir. 1981), *cert. denied*, 459 U.S. 823 (1982), there was no evidence that the University's decision in Brown's particular case had anything to do with its level of support for the Women's Studies Program, a program with which Brown did not even purport to be identified. (Jt. Ex. 9xxxx). In these circumstances, evidence concerning the Women's Studies Program lacked any probative value. Nonetheless, its potential to confuse or mislead the jury on the narrow issue it was to decide is manifest, particularly in light of the Court's statement to the jury that it might be evidence "of a disdain on the part of the administration or disapproval of Women's Studies" (Tr. IX 78).

APPENDIX B

EXCERPT FROM BRIEF OF APPELLANT TRUSTEES OF BOSTON UNIVERSITY TO THE COURT OF APPEALS (pp. 40-44)

Over the University's objection and despite the District Court's expressed doubts about its relevance (App. 376-80) Brown introduced evidence that the CLA Dean had not provided the degree of financial support for a Women's Studies Program that a committee had sought,[28] and concerning which the Dean had written that he had "reservations" about its "academic orientation" (App. 383-86).

Significantly, Brown did not show, or even contend, that the level of Women's Studies funding in any way affected the University's need for her services. Hence, the Women's Studies evidence had no relevance whatsoever to the central issue in Brown's case – the reason why she was denied tenure. The fact that its advocates may have desired increased funding for a particular program proves nothing; for the task of a university administrator, as the District Court recognized (App. 379), is to balance claims on the University's limited resources against requests advanced with equal fervor by supporters of other programs. Nor did the Dean's "reservations" logically translate into either a general hostility to female scholars or an attempt to limit their opportunities. In short, disagreements about the importance of particular courses or

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[28] Nevertheless, Brown's witness acknowledged that CLA had approved, and was offering, Women's Studies as a minor program (App. 387).

subjects simply do not illuminate the motives underlying a tenure decision.

In *Langland v. Vanderbilt University*, 589 F.Supp. 995, 1006 (M.D. Tenn. 1984), *aff'd without op.*, 772 F.2d 907 (6th Cir. 1985), a case involving a claim of sex discrimination by a female professor who was denied tenure, the court, adverting to a university's academic freedom to determine what shall be taught (see, *supra*, n. 11), attached no weight to a "women's studies" contention similar to that made on Brown's behalf and said: "whatever the opinion of this or any other court may be as to the importance of women's studies to a college curriculum, it is not the judiciary's function to advise university officials what to teach. . . . An inference of discrimination may not be drawn . . . from a judgment that one department or program is more deserving of funds than another, especially where, as here, there are insufficient resources to meet all the university's needs." 589 F.Supp. at 1006. And see *Hooker v. Tufts University*, 581 F.Supp. 98, 102 (D. Mass. 1983), a Title VII case in which a female physical education instructor also challenged a tenure denial. There, the court excluded evidence showing that the university had underfunded its physical education department and had thereby failed to comply with Title IX of the Civil Rights Act. The evidence was excluded, the court explained because of its "weak probative value" and because there was no nexus between funding compliance and tenuring of women faculty."[29]

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[29] *Lynn v. Regents of the University of California*, 656 F.2d 1337 (9th Cir. 1981), *cert denied*, 459 U.S. 823 (1982), cited by

(Continued on following page)

In this case, too, the evidence concerning the Women's Studies program lacked probative value. The potential of this evidence to confuse or mislead the jury is manifest, particularly in light of the District Court's nebulous statement to the jurors that "the remoteness or pertinence of this particular line of inquiry is up to you to evaluate" (App. 389-90).[30]

C. President Silber's Remarks

Evidence of remarks by President Silber on three occasions was admitted over the University's objections

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(Continued from previous page)

Brown to the District Court in support of the admissibility of Women's Studies evidence (App. 377, 382), is clearly distinguishable factually. In *Lynn*, the female professor found to have been discriminatorily denied tenure had done a "study of French literature concentrat[ing] heavily on women's issues, and the testimony ruled admissible "revealed that the University's evaluation of Lynn's scholarship was due, in part, to its view that women's studies is not a substantial topic for scholarly work." 656 F.2d at 1343, and n.4. Thus the required "nexus" present neither in *Hooker supra*, nor in this case, was plainly present in *Lynn*.

[30] The District Court's full statement was (App. 389-90); "Now, again, members of the jury, we suddenly shifted as you might have noticed from the English Department to Women's Studies, and this is being offered to the extent that it shows evidence of a disdain on the part of the administration or disapproval of Women's Studies, and you may consider that to the extent that you think that it is relevant or dispositive in determining whether there was any sexual discrimination in the denial of tenure of Professor Brown, and while, well, the remoteness or pertinence of this particular line of inquiry is up to you to evaluate."

(App. 288, 310-13, 592-08, 510-11). This evidence should have been excluded under Rules 401 and 403, Fed. Rules of Evidence.

1. *The 1984 Talk*: In December 1984, Silber addressed a Freedoms Foundation Symposium on Citizen Responsibilities held in Washington, D.C. Silber's talk entitled "Citizen Responsibility: The Stewardship of Time", was included in a Freedoms Foundation booklet reflecting what Silber and others said at the Symposium (App. 508-09). In his address, Silber puts the blame on society for not providing an alternative nurturing system for children while their parents are working (App. 520-21). Over the University's objection, Brown singled out a small segment of Silber's address (App. 570-71) that utterly distorted the overall, philosophic viewpoint that Silber expressed. The segment introduced concerned Silber's statements that "a single-parent family is likely to provide a far poorer environment for the initiation and sustenance of children," and that "in a two-parent family when both parents are at work there is less likelihood of providing an environment that encourages education – much less than in a two-parent family in which one parent remains at home for the nurture of the children, to devote himself or herself full time to their care, feeding and education" (App. 509-10, 570-71).

Silber's latter remarks clearly had no connection with the basic issue in this case – why Silber and the University refused to tenure Brown. Accordingly, that the remarks should not have been admitted in evidence on grounds of irrelevancy seems remarkably clear – especially when one considers that Silber's remarks were

made in 1984, some three years after Brown was denied tenure.

The University necessarily was harmed by the admission of Silber's 1984 remarks into evidence. For only by an utter distortion of Silber's words, and by indulging in the wildest speculation, could it be inferred that Silber's remarks carried with them a hidden sexist agenda-possibly, one of impeding women's access to the workforce.[31] But this distorted view is precisely the connotation that Brown's counsel placed on Silber's words, and which, moreover, she pressed on the jurors in her closing argument.[32]

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[31] On their face, Silber's remarks – even the distorted segment introduced in evidence by Brown – are gender neutral: they do not single out women; they do not propose that women refrain from working in order to devote themselves full-time to the care of their children; they simply set forth the view that the nurturing of children at home, rather than elsewhere, provides a better environment for educational encouragement. By no stretch of the imagination, therefore, can it be said that Silber's remarks demonstrate a discriminatory attitude towards women; nor do they even remotely show a "general atmosphere of discrimination" at the University.

[32] There, Brown's counsel, referring to Silber's speech, stated to the jurors (App. 531):

> [President Silber] bemoans the deterioration of three branches of society; the family, the church and the school. Who is to blame for the deterioration of the family? Well, women of course, single mothers and working mothers because mothers are out working instead of staying home with their children.

There is yet another reason why evidence of President Silber's speech remarks should not have been allowed – the risk of chilling academic speech. One of the most important functions of a university is to foster a spirited and free-wheeling debate about controversial matters of moral and political concern (see *supra*, pp. 14-15, 27). The role of university presidents is integrally related to the fostering of this debate. *See Kunda v. Muhlenberg College*, 621 F.2d 532, 547 (3rd Cir. 1980). Hence, the admission into evidence of a speech by an academic concerning a debatable topic, purportedly to show an ideological taint, will necessarily discourage university presidents, faculty members, and other university personnel who participate in tenure and promotion decision from making any statement which in another context – such as that of this case – may be viewed as insufficiently "progressive" or unpopular with a particular audience. *Cf. Redgrave v. Boston Symphony Orchestra*, 399 Mass. 93, 502 N.E. 2d 1375, 1377 (1987) (suggesting that exercise of the constitutional right of free speech cannot constitute evidence of interference with the rights of another).

APPENDIX C

EXCERPT FROM PETITION FOR REHEARING OF APPELLANT TRUSTEES OF BOSTON UNIVERSITY, PRESENTED TO THE FIRST CIRCUIT COURT OF APPEALS (pp. 3-7)

1. The Cumulative Effect of the District Court's Erroneous Rulings on the Admissibility of Evidence Requires A New Trial.

In its Opinion, the Court ruled that the district court erroneously allowed Brown to introduce before the jury the following four items of evidence: . . . (3) evidence setting forth a portion of a 1984 speech by President Silber at a Freedom Foundation Symposium – evidence which, as the Court noted, was cited to the jury by Brown's counsel in closing argument; but which the Court characterized as a "red-herring", "far afield," "ambivalent," and "close to" zero relevance, and which the Court "fear[ed]" could have a "chilling effect" on academic freedom (Op. 34-35); and (4) evidence of a letter written by the Dean of CLA in which the Dean responded negatively to a request for funding of a Women's Studies Program – evidence which the Court viewed as lacking "any tendency to show a discriminatory animus against women," and which "worrie[d]" the Court "because of its effect on free speech in a university" (Op. 36-38).

Although this evidence was deemed by the Court to have been improperly admitted, the Court treated each item separately and in isolation, and in this manner concluded that none of the evidence prejudiced the jury. Thus, . . . the reproduction for the jury of the passage from President Silber's Freedom Foundation speech was

characterized by the Court as "regrettable" but not prejudicial error because, the Court thought, "it highly unlikely that these remarks, in a trial of this complexity and length, would have had an effect on the outcome" (Op. 35-36)[3]; and the admission of the Dean's Women's Studies letter was deemed to have been "harmless error" because, "in the context of this particular trial," the Court was "not persuaded that [the trial's] outcome was affected by the admission of this evidence" (Op. 38).[4]

Taken in isolation, any one of the four items of evidence erroneously admitted by the district court may not itself have been prejudicial enough to justify reversing the judgment. Taken cumulatively, however, the admissions necessarily had, we submit, a magnified impact and made a significant difference in the University's chances of persuading the jury that it did not discriminate against Brown. This is especially so in light of the fact that two of

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[3] Somewhat contradictorily, the Court stated in its evaluation of the Freedom Foundation speech: "While one would hope that jurors would see them for what they are, there is the danger such red-herrings, skillfully manipulated, could cause a jury to stray" (Op. 35).

[4] Unlike the erroneously admitted Craddock and Goodheart evidence, neither the Freedom Foundation evidence nor the Women's Studies evidence was "repetitive" or "substantially the same" as other evidence before the jury. Nor was the jury charged to ignore this evidence. Accordingly, the Court's view that the admission of the Freedom Foundation and Women's Studies evidence was harmless and non-prejudicial to the University is clearly open to dispute. Especially is this so with respect to the Freedom Foundation evidence which Brown's attorney emphasized in her closing statement to the jury.

the items erroneously admitted – the President's Freedoms Foundation speech and the Dean's Women's Studies letter – were adduced by Brown to show discriminatory attitudes towards women on the part of the two principal decision-makers on Brown's tenure request.[5] Thus, as Brown's presentation was obviously intended to bring about, the cumulative effect of the erroneously admitted evidence was to strengthen in the juror's minds a positive impression about Brown and a negative impression about President Silber and the CLA Dean: positive about Brown, because of her supposedly outstanding reputation beyond the Boston University campus and the supposedly high quality of the book she had produced; negative about the President and the Dean, because of the President's supposedly prejudiced statement against working mothers and the Dean's supposedly prejudiced veto of a course of study dealing with issues affecting women.

The principle that courts of appeals will consider and evaluate the cumulative effect of erroneous evidentiary rulings in both civil and criminal cases is well-established. See *Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097, 1105 (8th Cir. 1988); *Haskell v. Kaman Corporation*, 743 F.2d 113, 122 (2d Cir. 1984) (age discrimination case); *Fish v. Georgia-Pacific Corporation*, 779 F.2d 836, 840 (2d Cir.

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[5] The only other evidence adduced by Brown to show discriminatory animus were President Silber's two remarks in connection with Professor Costello's tenure candidacy – remarks that the Court deemed admissible, but as to which the Court said: "To be sure, it is a tremendous leap to infer from remarks such as these that President Silber denied Brown tenure because of her gender" (Op. 32).

1985); *McQuiston v. K-Mart Corporation*, 796 F.2d 1346, 1350 (11th Cir. 1986); *United States v. Soundingsides*, 820 F.2d 1232, 1243-44 (10th Cir. 1987), *rehearing den.* 825 F.2d 1468 (1987); *United States v. Wright*, 783 F.2d 1091, 1093 (D.C. Cir. 1986) *United States v. Rivera*, 490 F.2d 444, 448, 451 (5th Cir. 1974). This Court, too, has endorsed the principle. *Kassel v. Gannett Co., Inc.*, 875 F.2d 935, 953 (1st Cir. 1989); *Wells Real Estate v. Greater Lowell Bd. of Realtors*, 850 F.2d 803, 817 (1st Cir. 1988). And in most such cases, the application of the principle has resulted in the reversal of the outcome of the trial below: *Estes, supra; Haskell, supra; Fish, supra; Soundingsides, supra; Kassel, supra.*

Accordingly, we now ask, respectfully, that the Court consider and evaluate the cumulative effect on the University's substantial rights of the four items of inadmissible evidence here discussed. Thus considered, and for the reasons we have here set forth, the conclusion is inexorable, we submit, that the evidence was prejudicial to the University, and therefore that, to paraphrase the Court (Op. 20), the jury's verdict is "obviously" and "manifestly" unsupportable.

No. 89-1680

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

TRUSTEES OF BOSTON UNIVERSITY,
Petitioner,

v.

JULIA PREWITT BROWN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF OF AMERICAN COUNCIL ON EDUCATION, AMICUS CURIAE, IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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BRIEF OF AMERICAN COUNCIL ON EDUCATION, AMICUS CURIAE, IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

INTEREST OF THE AMICUS CURIAE [1]

The American Council on Education, which was founded in 1918, is one of the nation's leading higher education organizations. Its members include more than 1500 colleges and unversities, both public and private, as well as

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[1] This brief is submitted with the consent of the parties pursuant to Supreme Court Rule 37. Letters of consent are on file with the Clerk.

other higher education groups. The Council aims to promote and preserve the goals of higher education, including the interests of its constituent institutions, their students, faculty and administrators. The Council participates in only a few cases each year which, like this one, raise significant issues of importance to institutions of higher education in the United States.

The Council's concerns in this case arise principally from the judicial award of tenure to remedy a finding of sex discrimination. At issue is how best to balance the national goal of eliminating employment discrimination with the constitutionally-protected interest of our nation's colleges and universities in the preservation of their freedom from control by the state. The resolution of this issue is of great importance to the Council and its members, all of whom are committed not only to equal employment opportunity but also to the preservation of the system of self-governance which is essential to the mission of institutions of higher education.

For these reasons, a definitive resolution of the issues presented by the petition for certiorari will necessarily benefit the Council and its member colleges and universities. Accordingly, the Council supports the petition and respectfully submits its views on the issues presented.

REASONS FOR GRANTING THE PETITION

I.

The Council does not assert that personnel decisions made by colleges and universities are in any sense exempt from measurement against the goals and requirements of Title VII. It does assert, however, that because of the striking singularity of academic tenure, as well as the First Amendment protection accorded a university to determine on academic grounds "who may teach," the Court should consider and decide the principal issue raised by the certiorari petition: Whether, in the con-

text of a finding of liability under Title VII, a remedy of academic tenure may be judicially imposed in the face of a genuine and serious dispute about the academic qualifications of a tenure candidate.

A. A university's decision to confer academic tenure stands dramatically apart from employment decisions in other contexts. *Zahorik v. Cornell University*, 729 F.2d 85, 92 (2d Cir. 1984). ("[T]enure decisions in an academic setting involve a combination of factors which tend to set them apart from employment decisions generally."). The award of tenure follows a lengthy probationary period—seven years long at most universities. *See 1940 Statement of Principles and Interpretive Comments*, American Association of University Professors, "Policy Documents and Reports," 1984 ed., p. 4. In addition, tenure reflects what is essentially a lifetime commitment on the part of the university to the individual. It is based on factors that are both subjective and quite extensive. "The particular needs of the department for specialties, the number of tenure positions available, and the desired mix of well known scholars and up-and-coming faculty all must be taken into account. The individual's capacities are obviously critical. His or her teaching skills, intelligence, imagination, willingness to work, goals as a scholar and scholarly writing must be evaluated . . . ." *Zahorik, supra*, at 92.

Further, a university's "business" is academic excellence; and its very essence depends upon the quality of its faculty—especially its tenured faculty. Moreover, a faculty member's contribution to that excellence is not confined to his or her own academic achievements, because the tenured faculty of a university may exercise significant control over the direction and management of the institution. See *N.L.R.B. v. Yeshiva University*, 444 U.S. 672 (1980). Thus, when tenure decisions are made, these latter factors must also be carefully weighed by a university president and its trustees—the persons charged

with the ultimate responsibility for a university's continuance as a viable educational entity and as a contributor to the betterment of the society in which it exists.

In sum, the complexities of a university's tenure decision are such that there will inevitably be a multiplicity of factors involved; for the process of tenuring at a university involves many layers of decision-making, all rendering subjective judgments of a candidate's past performance and future promise. The success of a worthy candidate is by no means assured, and when the decision is finally made, it will necessarily reflect a range of considerations.[2]

B. The record in this case establishes that the respondent's candidacy for tenure was uncertain and fraught with doubts unconnected with discriminatory motive.[3]

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[2] The testimony in this case of Boston University's president, Dr. John Silber, provides insight into the workings of the tenure process at a large, "mature" university. Dr. Silber testified that the ability to offer tenured contracts enables a university to recruit faculty members of oustanding quality and thus to compete successfully with other institutions for the enrollment of students. When he became its president in 1971, Dr. Silber found that Boston University was "in the red" intellectually. Accordingly, he insisted that the tenure standards of the past be raised year by year, so that Boston University finally reached "a point at which tenure standards were as demanding here as they are anywhere." Dr. Silber also noted that an award of tenure typically binds Boston University for a period of 40 years and involves a commitment of about $2,000,000 (C.A. App. 453-57, 475-76).

The determination of whether tenure should be granted, Dr. Silber testified, is "a very complex decision" that takes multiple factors into account, including a university's financial stability and its other needs. Accordingly, "[t]here is a presumption that tenure should not be awarded to any candidate;" and it is granted only when "there is overwhelming reason for doing so" (C.A. App. 462-64)).

[3] The Council does not mean to express any view as to the merits of the respondent's tenure candidacy; the point is that the record reflects that the case for mandated tenure for the respondent is, at best, mixed and ambiguous.

Indeed, the district court stated that there was "some dispute as to the quality of [the respondent's] scholarship." Cert. Pet. 68a. For example, although the respondent was unanimously recommended for tenure by the members of her department and by the College Appointments, Promotions, and Tenure ("APT") Committee, the vote of the University APT Committee, although supportive, was not unanimous. The latter Committee, as well as the College Dean, the University's Assistant Provost, and the University's Provost had some doubts about the respondent's scholarship. Further, an *ad hoc* Tenure Review Committee ("TRC"), composed of three impartial professors from outside Boston University, recommended that the respondent be tenured with one member dissenting and with all members expressing "reservations" about Brown's qualifications for tenure. See Cert. Pet. 3-7, 4a-9a.[4]

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[4] Again, Dr. Silber's testimony in this case is illustrative of the working of the tenure process at "mature" universities and the manner in which university presidents treat a tenure candidacy. Dr. Silber, who twice reviewed the respondent's tenure file, explained at trial how he reaches a decision concerning the grant of tenure, and why the "negatives" concerning the respondent influenced his decision to deny her tenure. To reach a tenure decision, Dr. Silber "feels personally obligated to review with care recommendations made by anyone who is asked for an opinion and to evaluate their assessments." In weighing the quality of a recommendation, Dr. Silber looks to the facts supporting it, to the background and competence of the person making it, and to the relationship of the person to the candidate. Accordingly, in order to achieve "as much objectivity as is possible," Dr. Silber does "not rely exhaustively or even primarily on the opinion of [a candidate's] immediate colleagues [because] a system of friendship or antipathy nearly always develops within a department," and thus the department may be "predisposed" for or against a candidate "without good justification" (C.A. App. 459-461).

When Dr. Silber reviewed the respondent's tenure candidacy the first time, he paid "a great deal of attention" to the reviews of her Austen book, especially the N.Y. Times review by Tony Tanner, whose criticism, Silber thought, "was very substantial," and to Pro-

Accordingly, it is clear that this is not a case where tenure has been denied on the basis of a record showing that the plaintiff's qualifications for tenure were undisputed. *Cf. Ford v. Nicks*, 741 F.2d 858, 864 (6th Cir. 1984); *Kunda v. Muhlenberg College*, 621 F.2d 532 (3rd Cir. 1980). Where there is such a dispute—and thus where there is clearly some basis for denying tenure on academic grounds irrespective of alleged sex discrimination—judicial awards of tenure intrude quite significantly on academic freedom and the parameters for such awards should be addressed by this Court.

C. Because of the vital role of education in our society and the nation's commitment to freedom of speech and academic freedom, the Court has noted that academic institutions possess certain "essential freedoms" under the First Amendment, including the freedom to determine for themselves, on academic grounds, who may teach at the institutions. *Regents of the University of California v. Bakke*, 438 U.S. 265, 312 (1978); *Keyishian v. Board of Regents of New York*, 385 U.S. 589, 603 (1967); *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring); *Widmar v. Vincent*, 454 U.S. 263, 279 n.2 (1985) (Stevens, J., concurring). Further, the Court has narrowed the power of the judiciary to overrule university decisions made on academic grounds:

> When judges are asked to review the substance of a genuinely academic decision . . . they should show

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fessor Tave's evaluation, which was "a very negative assessment" (C.A. App. 460, 470-72). He therefore regarded the three-year extension recommendations of the Dean and Provost as "ideal," because such an extension "would give a young, promising scholar an opportunity to demonstrate that level of maturity that had not yet been shown, and [he] was very hopeful that within another three years this candidate would clearly justify tenure" (C.A. App. 465-66, 473-76). After his second review, Dr. Silber concluded that the TRC evaluations confirmed his earlier view that the respondent should not be tenured at that time (C.A. App. 477-91).

> great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.

Regents of University of Michigan v. Ewing, 474 U.S. 214, 225 (1985) (where the Court rejected a substantive due process challenge to a state university's decision to dismiss a student).

Despite such pronouncements, the Court has not ruled squarely on the issue of whether a university's interest in determining who should be awarded tenure—i.e., "who may teach" at the university—may be undermined judicially even though there exists a genuine dispute as to the academic qualifications of a tenure candidate. Moreover, in the recent *University of Pennsylvania v. E.E.O.C.* case, —— U.S. ——, 107 L.Ed.2d 571 (1990), the Court recognized this issue, but expressly left it for a future decision: "We need not define today the precise contours of any academic-freedom right against governmental attempts to influence the content of academic speech through the selection of faculty. . . ." 107 L.Ed.2d at 587. Additionally, the Court also there repeated the cautionary statement in the earlier *Regents of University of Michigan v. Ewing* case, *supra*, that judges " 'should show great respect for the faculty's professional judgment,' " adding that "[n]othing we say today should be understood as a retreat from this principle of respect for *legitimate* academic decisionmaking." *Id* at 588 (emphasis in original).

In this posture of the law, this Court's resolution of the "judicial tenuring of professors" issue appears highly desirable. As we have stated in describing the Council's "Interest" in this case, the immediate resolution of this academic freedom issue would serve the interests of both the Council and its members.

CONCLUSION

For the foregoing reasons, the Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: May, 1990

No. 89-1680

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

TRUSTEES OF BOSTON UNIVERSITY,
Petitioner,

v.

JULIA PREWITT BROWN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, AMICUS CURIAE, IN SUPPORT OF RESPONDENT

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BRIEF OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, AMICUS CURIAE, IN SUPPORT OF RESPONDENT

The American Association of University Professors files this brief *amicus curiae* in opposition to the Petition for a Writ of Certiorari with the consent of the parties. Letters of consent are on file with the Clerk. This brief addresses only the first question presented for review, concerning the judicial award of tenure as a remedy for discrimination.

INTEREST OF THE AMICUS

The American Association of University Professors (hereinafter "AAUP" or the "Association") is a na-

tional membership organization of more than 40,000 college and university faculty members and research scholars in all academic disciplines. Founded in 1915, it is the nation's oldest and largest body dedicated to the advancement of higher education from the perspective of the faculty. The Association, which participates in litigation on a very selective basis, filed a brief *amicus curiae* in support of Professor Brown in the court of appeals, as did the Equal Employment Opportunity Commission.

AAUP, frequently in collaboration with other higher education organizations, formulates national standards for the academic community. AAUP policy statements address many facets of academic life, including the protection of academic freedom and tenure, procedural standards for the renewal of faculty appointments, the faculty role in institutional governance, and the elimination of discrimination in higher education.[1] State and federal courts throughout the country, including this Court, have referred to AAUP policy statements in resolving disputes involving faculty members, their institutions, and their

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[1] The major AAUP policy statements are compiled in *AAUP Policy Documents & Reports* (1984), a copy of which is in the Supreme Court library. The AAUP statements referred to herein may be found in this volume. The 1940 *Statement of Principles on Academic Freedom and Tenure*, prepared jointly by AAUP and the Association of American Colleges, is the "most widely-accepted academic definition of tenure." *Krotkoff v. Goucher College*, 585 F.2d 675, 679 (4th Cir. 1978). Over 130 educational organizations and learned societies have endorsed the 1940 *Statement*. The Association's derivative *Statement on Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments* (adopted initially in 1971; revised in 1989) sets forth procedures to safeguard against decisions adversely affecting a faculty member that would be violative of academic freedom, impermissibly discriminatory, or based on inadequate consideration. *See Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 579 n.17 (1971).

students.[2] Among these policy statements is the 1976 *Statement on Discrimination* which condemns discrimination on the basis of sex, race, and other factors not directly relevant to professional performance, and which reflects the Association's commitment to eliminating such discrimination in colleges and universities. *AAUP Policy Documents & Reports* 73 (1984).

A fundamental premise accepted within the academic community is that colleagues and fellow specialists are best able to assess the scholarly contributions and potential of individual faculty members. The 1966 *Joint Statement on Government of Colleges and Universities*, formulated by AAUP, the American Council on Education, and the Association of Governing Board of Universities and Colleges, states that the faculty has the primary role in making decisions about the status of faculty appointments. *AAUP Policy Documents & Reports* 105, 109 (1984). This joint statement, formulated by faculty, administration and trustee representatives, places in the hands of the faculty the basic responsibility for judging the qualifications of tenure candidates.

The AAUP's interests in this case extend to protecting the role of the faculty in tenure decisions and to ensuring that illegal or improper considerations do not taint tenure deliberations. The decision of the United States Court of Appeals for the First Circuit respects these interests, does not conflict with any other circuit decision, and, under the facts presented, properly reconciles the principles of non-discrimination and academic freedom.

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[2] *E.g., Delaware State College v. Ricks*, 449 U.S. 250, 264 n.3 (1980) (Stewart, J., dissenting); *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 579 n.17 (1972); *Gray v. Board of Higher Education*, 692 F.2d 901, 907 (2d Cir. 1982).

REASONS FOR DENYING THE PETITION

Introduction And Summary of Argument

This case presents no issues worthy of a writ of certiorari. No conflict among the circuit courts of appeals is created by the decision in this case. The award of tenure, affirmed below, was the only relief that could make Professor Brown whole, insofar as the denial of her tenure and the university's offer of an extended probationary appointment were found to be discriminatory. Furthermore, the award of tenure in this case properly gives force and effect to the nearly unanimous, and truly academic, judgments of the faculty and expert panels that recommended tenure.

Contrary to the assertions of Petitioner Boston University, no conflict exists among the circuit courts of appeals. In fact, the decision below acknowledges, as does the decision with which Petitioner contends it conflicts, the unique nature and purposes of tenure. Both decisions recognize that, in appropriate factual circumstances, a judicial award of tenure may be proper.

Since Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Sec. 2000e-5(g), authorizes remedies including reinstatement and promotion, reinstatement for a faculty member discriminatorily denied tenure may properly be accompanied by tenure itself. On the facts proved below, equitable relief including reinstatement with tenure is the only remedy that could make the plaintiff whole. Questions concerning whether judicially awarded tenure is necessary to afford complete relief to a victim of discrimination are fact-dependent and fail to present any legal issue of overriding importance to justify this Court's intervention. The fashioning of appropriate remedies under Title VII is ordinarily left to the sound discretion of the trial court, and no abuse of that discretion occurred here.

To the extent that the Petition suggests that a judicial award of tenure may never be made regardless of the

facts proven at trial, Petitioner cannot claim direct support from any authority. Petitioner's argument, furthermore, asserts that a right rooted in the First Amendment insulates universities from make-whole relief for illegal discrimination on the basis of a faculty member's sex. Such an affirmative right to discriminate has been rejected by this Court. There is simply no constitutional right to discriminate on the basis of sex. To hold otherwise eviscerates the standards established by this Court in *Regents of University of Michigan v. Ewing*, 474 U,S. 214 (1985), for determining when judicial deference to academic judgment is required and when claims of academic freedom are, as in this case, abused by the party asserting such an interest.

I. The Decision Below Does Not Conflict with *Gutzwiller v. Fenik.*

The Petition contends that the decision below conflicts with the decision of the Court of Appeals for the Sixth Circuit in *Gutzwiller v. Fenik*, 860 F.2d 1317 (6th Cir. 1988). The university alleges that the decision below requires an automatic award of tenure in each case where a plaintiff has not received tenure, while the Sixth Circuit limits awards of tenure to those cases in which no dispute exists as to the plaintiff's academic qualifications. Petition at 16-17. No conflict exists among the circuits on the propriety of judicial awards of tenure in appropriate fact-dependent cases. Each court considering whether tenure may be judicially awarded has observed that it is an available remedy where the factual circumstances require such an award to make the victim of discrimination whole.[3] Petitioner's effort to create a con-

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[3] In addition to the First Circuit in this case, the Third and Sixth Circuits have recognized the availability, and actually affirmed remedial awards, of tenure in appropriate factual circumstances. *Ford v. Nicks*, 866 F.2d 865 (6th Cir. 1989), 741 F.2d 858 (6th Cir. 1984), *cert. denied*, 469 U.S. 1216 (1985) (award of tenure to husband affirmed where, absent retaliatory nonreappointment, he

flict among the circuits falls wide of the mark, as the decision below can readily be reconciled with *Gutzwiller*.[4]

It is axiomatic that when a faculty member prevails on a claim that she has been denied tenure because of her sex in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Sec. 2000e *et seq.*, she is entitled to relief that will make her whole. *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975). Professor Brown's colleagues in the English Department were unanimously supportive of her candidacy, as was the College of Liberal Arts faculty review committee. A third faculty review committee and an outside panel of experts were nearly unanimous as well. The Dean's recommendation in favor of tenure was rejected by the Provost and President. The court below adequately reviewed the record, determined that the evidence supported the jury's conclusion that but for discriminatory animus Professor Brown would have received tenure. Since, ab-

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would have attained tenure by operation of state law; award to wife reversed where, absent nonreappointment, she would have attained only eligibility to be evaluated for tenure); *Gutzwiller v. Fenik*, 860 F.2d 1317 (6th Cir. 1988) (remanding case to district court to determine whether facts required a judicial award of tenure); *Kunda v. Muhlenberg College*, 621 F.2d 532 (3rd Cir. 1980) (affirming award of conditional tenure where college discriminatorily failed to advise a faculty member of a degree requirement for attaining tenure). *See also, Pyo v. Stockton State College*, 603 F.Supp. 1278, 1284 (D.N.J. 1985) (discussing possible remedies under a variety of factual circumstances, "court cannot rule out an award of tenure").

[4] Petitioner erroneously contends that the factual circumstances of *Gutzwiller* are identical to the factual circumstances of this case. Professor Gutzwiller received but one vote in favor of tenure and that one from a Dean, not a fellow faculty member. 860 F.2d at 1322-24. Professor Brown, in contrast, received nearly unanimous support from faculty and outside expert review panels. Among those panels, over 40 votes were cast, only 3 were negative. *See* Pet. app. 3a-9a.

sent discrimination, Professor Brown's candidacy for tenure would have been successful, she cannot be made whole without an award of tenure. A tenured position, rather than yet another opportunity to be evaluated for tenure or an extended probationary appointment, is the remedy that satisfies the remedial purposes of Title VII.[5] It was tenure itself that was discriminatorily denied.

In *Gutzwiller*, the discrimination infecting the tenure review occurred at the very beginning of the process. Professor Gutzwiller never received an unbiased evaluation, due to the invasion at the first level of the review process by the sexual bias of the two most influential faculty members.[6] Unlike Professor Brown, Professor

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[5] Boston University's suggestion that Professor Brown would have been made whole if she had accepted the proposed extended probationary period subverts the standards for tenure proceedings established by AAUP and widely endorsed in the academic community. The 1940 *Statement of Principles on Academic Freedom and Tenure, AAUP Policy Documents & Reports* 3 (1984), establishes that the probationary appointment should not exceed seven years. Extending the probationary appointment is not generally recognized as an acceptable alternative to a decision either to grant tenure or not to retain the probationer, and it does nothing to remedy a wrongful denial of tenure. Moreover, in this case, the offer of extended probation as an alternative to tenure was itself discriminatory. Pet. app. 49a.

The purpose of make-whole relief was explained in Congress during consideration in 1972 of the amendments to Title VII as requiring "that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination." 118 Cong. Rec. 7168 (1972). Former EEOC Commissioner Fred W. Alvarez has observed that nondiscriminatory placement in the position the person would have held absent discrimination, if possible, is essential to enforcement of Title VII. Alvarez, F., "Remedies for Unlawful Employment Discrimination," 3 *The Labor Lawyer* (ABA) 199 (1987).

[6] With the exception of Professors Fenik and Cohen, all faculty reviewers were found not to have discriminated against Professor Gutzwiller. Professors Fenik and Cohen unduly influenced the other faculty reviewers. 860 F.2d at 1327.

Gutzwiller received no evaluation of her tenure-worthiness free of discriminatory taint, and thus her qualifications for tenure were never properly reviewed. For this reason Professor Gutzwiller's tenure-worthiness may be considered unknown or disputable, and a remedy that allows her to receive an unbiased review may well make her whole.[7] In its remand of *Gutzwiller*, the court of appeals did not rule out tenure as an appropriate remedy, and directed the trial court to consider equitable relief. The court of appeals indicated that tenure, front pay, or reconsideration for tenure could be appropriate. 860 F.2d at 1333. Here, unlike the *Gutzwiller* circumstances, there is no true dispute over Professor Brown's tenure qualifications. Petitioner's efforts to create a dispute as to Profesor Brown's academic qualifications ignore the nearly unanimous recommendations Professor Brown received from the faculty and expert panels.

Both the Sixth Circuit in *Gutzwiller* and the First Circuit here recognized the unique nature of tenure, their responsibilities to avoid making tenure judgments *ab initio*, and the fact-dependent nature of the judicial award of tenure.[8] In a very real sense, the discrimination in *Gutzwiller* deprived the plaintiff of unbiased consideration for tenure at any stage in the process. In this case, the discrimination did not deny Professor Brown the opportunity for unbiased faculty and expert evaluations, but deprived her of tenure itself.[9] Carrying its

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[7] Since the evaluation by faculty colleagues is indispensable and primary (*see* 1966 *Joint Statement on Government of Colleges and Universities, AAUP Policy Documents & Reports* 105, 109 (1984)), Professor Gutzwiller's qualifications for tenure could not be accurately reviewed until an unbiased faculty evaluation was conducted.

[8] *See Gutzwiller v. Fenik*, 860 F.2d at 1333; Pet. app. 47a-50a.

[9] *See Pyo v. Stockton State College*, 603 F.Supp. 1278, 1284 n.5 (D.N.J. 1985) ("the relief may depend on the level of the tenure process at which the discriminatory decision or recommendation was made. The earlier in the process the discrimination occurred, the more speculative a determination would seem to be that

manufactured dispute of Professor Brown's qualifications further, Boston University implies that Professor Brown would be a marginal member of the university community, overlooking the facts that her tenure-track contract was regularly renewed after she commenced teaching in 1974, that her colleagues in the English Department and the College of Liberal Arts were unanimously supportive of her tenure candidacy, and that the administration offered to promote her to Associate Professor and to extend her probationary appointment for an additional three years.

Boston University suggests judicial awards of tenure should be reserved for those cases in which there is absolutely no dispute over the candidate's qualifications. Petition at 14. A university which denies tenure to a faculty member could always point to some aspect, however trivial, of that negative decision as having created a dispute over the candidate's qualifications. Petitioner's proposal thus amounts to virtually no standard at all. The EEOC's arguments supporting Professor Brown in the court below suggest that the university's proposal would undermine the remedial provisions of Title VII. The EEOC, as an *amicus* below, observed:

> In the absence of compelling reasons to grant Brown less than make whole relief, denial of tenure would violate Congress' mandate and the Supreme Court's directive in *Albemarle*, 422 U.S. at 418.

Brief for the United States Equal Employment Opportunity Commission as *Amicus Curiae* at 8, filed in *Brown*

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later decision makers, but for discrimination, would have acted differently."). *See also, Ford v. Nicks*, 866 F.2d 865 (tenure remedy reversed where faculty member was never evaluated for tenure); *Briseno v. Central Community College Area*, 739 F.2d 344 (8th Cir. 1984) (tenure remedy inappropriate where, but for discrimination, plaintiff would have been hired into a probationary position); *Gurmankin v. Constanzo*, 556 F.2d 184 (3rd Cir. 1980), *cert. denied*, 450 U.S. 923 (1981) (affirming district court refusal to order tenure where plaintiff had never been evaluated for tenure).

v. Trustees of Boston University, No. 88-1288 (1st Cir.). Untested in the lower courts and disfavored by the EEOC, Petitioner's suggested standardless rule of deference is unworthy of this Court's attention.

Assuming, solely for the sake of argument, that a general rule should prohibit judicial awards of tenure unless no legitimate academic dispute exists as to a candidate's qualifications, the record in this case satisfies such a standard. Every faculty and expert panel evaluating Professor Brown's candidacy recommended tenure. The policy standards of the AAUP, joined by representatives of college and university administrators and trustees, establish such peer and expert evaluations as primary in tenure review proceedings. A final decision departing from the faculty and expert recommendations is appropriate only in "rare" and "exceptional" cases when justified by "compelling" reasons. 1966 *Joint Statement on Government of Colleges and Universities, AAUP Policy Documents & Reports* 105, 109 (1984). In light of Professor Brown's support among the faculty and expert panels and the jury's determination that her sex was the reason for the tenure denial, no legitimate dispute raising "compelling" reasons to deny tenure is presented in this case.

II. First Amendment Academic Freedom Interests Do Not Insulate Universities From Make-Whole Remedial Orders For Violations of Anti-Discrimination Statutes.

This Court has observed that "[t]here is no constitutional right to discriminate in the selection of who may attend a private school or join a labor union," become an employee, receive tenure in a university, or become a partner in a law firm. *Hishon v. King & Spaulding*, 467 U.S. 69, 78 (1984). Vigilant protection of First Amendment academic freedom interests is essential to the well-being of universities and faculty, but the existence of those interests does not establish a safe harbor for illegal discrimination. In *Hishon*, this Court further observed:

"[A]s we have held in another context, '[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections.' *Norwood v. Harrison*, 413 U.S. 455, 470 (1973)." *Id.*[10]

This Court has long recognized that academic freedom, including the freedom to "determine . . . on academic grounds who may teach," is entitled to protection under the First Amendment. *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring). *Accord, Regents of the University of California v. Bakke*, 438 U.S. 265, 312 (1978) (Powell, J.); *Keyishian v. Board of Regents of New York*, 385 U.S. 589, 603 (1967). From this fundamental and indisputable principle the University draws a more questionable implication, that its intentionally discriminatory decisions also constitute exercises of academic freedom and are shielded from meaningful judicial remedy.

In *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 225 (1985), this Court observed that "genuinely academic decisions" are entitled to judicial deference unless the determination is

> such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.

Under the *Ewing* standards, decisions "determin[ing] . . . who may teach" are entitled to First Amendment protection and judicial deference on principles of academic

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[10] *Powell v. Syracuse University*, 580 F.2d 1150, 1153-54 (2d Cir. 1978) (court explained that its precedent does not mandate "minimal scrutiny of college and university employment practices," but respect for "relative institutional competences," and noted that its precedent, *Faro v. New York University*, 502 F.2d 1229 (2d Cir. 1974), "does not and was never intended to, indicate that academic freedom embraces the freedom to discriminate.")

freedom to the extent that the decisions are "genuinely academic decisions," "on academic grounds," and reflect "professional judgments" adhering to "accepted academic norms."

In this case, Boston University had the opportunity to rest its decision on professional grounds and to adhere to academic norms. Instead, the university allowed illegal considerations to intrude, in determinative part, on the tenure process, resulting in the discriminatory denial of tenure. Intentionally discriminatory determinations of "who may teach" are not "genuinely academic decisions," as they fail to adhere to "accepted academic norms." [11] Nor do they constitute decisions "on academic grounds." [12]

This Court recently clarified that academic freedom requires the protection of "*legitimate* academic decisionmaking." *University of Pennsylvania v. EEOC*, —— U.S. ——, 110 S.Ct. 577, 587 (1990) (emphasis in original). Congress extended Title VII's coverage to colleges and universities, in part in order to remedy the "lack of access for women and minorities to higher ranking (*i.e.*, tenured) academic positions. See H.R. Rep. No. 92-238, pp. 19-20 (1971), U.S. Code Cong. & Admin. News 1972, pp. 2137, 2154-2155." *Id.* at 582. Clearly, Congress did not view discriminatory denials of tenure to be "legitimate academic decisionmaking" and contemplated that extension of Title VII to educational institutions would provide a meaningful remedy for a discriminatory denial of tenure.

Academic freedom cannot be contorted to insulate universities from judicial awards of tenure in appropriate

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[11] *See Gutzwiller v. Fenik*, 860 F.2d at 1329. *See also* 1976 *Statement on Discrimination, AAUP Policy Documents & Reports* 73 (1984).

[12] The court of appeals suggested, as the amicus EEOC argued, that a decision based on discriminatory animus is not a decision "on academic grounds." Pet. app. 48a.

cases without eviscerating Title VII and abandoning all standards for determining whether a university's decision is entitled to judicial deference. The Petitioner's arguments seek to erect academic freedom and the First Amendment as nearly impenetrable barriers, creating a constitutional sanctuary for intentionally discriminatory decisions made in the academic community. This Court has consistently rejected efforts to create a constitutional right to discriminate on illegal bases and should refuse to hear another case that, in effect, urges the same proposition.

CONCLUSION

This Court should deny the Petition for a Writ of Certiorari. There is no conflict among the circuits, and the decision below correctly reconciles First Amendment interests and interests in the enforcement of civil rights.

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May 29, 1990

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No. 89-1680

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

TRUSTEES OF BOSTON UNIVERSITY,
Petitioner,

v.

JULIA PREWITT BROWN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF OF AMERICAN COUNCIL ON EDUCATION, AMICUS CURIAE, IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF THE AMICUS CURIAE[1]

The American Council on Education, which was founded in 1918, is one of the nation's leading higher education organizations. Its members include more than 1500 colleges and unversities, both public and private, as well as

[1] This brief is submitted with the consent of the parties pursuant to Supreme Court Rule 37. Letters of consent are on file with the Clerk.

other higher education groups. The Council aims to promote and preserve the goals of higher education, including the interests of its constituent institutions, their students, faculty and administrators. The Council participates in only a few cases each year which, like this one, raise significant issues of importance to institutions of higher education in the United States.

The Council's concerns in this case arise principally from the judicial award of tenure to remedy a finding of sex discrimination. At issue is how best to balance the national goal of eliminating employment discrimination with the constitutionally-protected interest of our nation's colleges and universities in the preservation of their freedom from control by the state. The resolution of this issue is of great importance to the Council and its members, all of whom are committed not only to equal employment opportunity but also to the preservation of the system of self-governance which is essential to the mission of institutions of higher education.

For these reasons, a definitive resolution of the issues presented by the petition for certiorari will necessarily benefit the Council and its member colleges and universities. Accordingly, the Council supports the petition and respectfully submits its views on the issues presented.

REASONS FOR GRANTING THE PETITION

I.

The Council does not assert that personnel decisions made by colleges and universities are in any sense exempt from measurement against the goals and requirements of Title VII. It does assert, however, that because of the striking singularity of academic tenure, as well as the First Amendment protection accorded a university to determine on academic grounds "who may teach," the Court should consider and decide the principal issue raised by the certiorari petition: Whether, in the con-

text of a finding of liability under Title VII, a remedy of academic tenure may be judicially imposed in the face of a genuine and serious dispute about the academic qualifications of a tenure candidate.

A. A university's decision to confer academic tenure stands dramatically apart from employment decisions in other contexts. *Zahorik v. Cornell University*, 729 F.2d 85, 92 (2d Cir. 1984). ("[T]enure decisions in an academic setting involve a combination of factors which tend to set them apart from employment decisions generally."). The award of tenure follows a lengthy probationary period—seven years long at most universities. *See 1940 Statement of Principles and Interpretive Comments*, American Association of University Professors, "Policy Documents and Reports," 1984 ed., p. 4. In addition, tenure reflects what is essentially a lifetime commitment on the part of the university to the individual. It is based on factors that are both subjective and quite extensive. "The particular needs of the department for specialties, the number of tenure positions available, and the desired mix of well known scholars and up-and-coming faculty all must be taken into account. The individual's capacities are obviously critical. His or her teaching skills, intelligence, imagination, willingness to work, goals as a scholar and scholarly writing must be evaluated . . . ." *Zahorik, supra*, at 92.

Further, a university's "business" is academic excellence; and its very essence depends upon the quality of its faculty—especially its tenured faculty. Moreover, a faculty member's contribution to that excellence is not confined to his or her own academic achievements, because the tenured faculty of a university may exercise significant control over the direction and management of the institution. See *N.L.R.B. v. Yeshiva University*, 444 U.S. 672 (1980). Thus, when tenure decisions are made, these latter factors must also be carefully weighed by a university president and its trustees—the persons charged

with the ultimate responsibility for a university's continuance as a viable educational entity and as a contributor to the betterment of the society in which it exists.

In sum, the complexities of a university's tenure decision are such that there will inevitably be a multiplicity of factors involved; for the process of tenuring at a university involves many layers of decision-making, all rendering subjective judgments of a candidate's past performance and future promise. The success of a worthy candidate is by no means assured, and when the decision is finally made, it will necessarily reflect a range of considerations.[2]

B. The record in this case establishes that the respondent's candidacy for tenure was uncertain and fraught with doubts unconnected with discriminatory motive.[3]

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[2] The testimony in this case of Boston University's president, Dr. John Silber, provides insight into the workings of the tenure process at a large, "mature" university. Dr. Silber testified that the ability to offer tenured contracts enables a university to recruit faculty members of oustanding quality and thus to compete successfully with other institutions for the enrollment of students. When he became its president in 1971, Dr. Silber found that Boston University was "in the red" intellectually. Accordingly, he insisted that the tenure standards of the past be raised year by year, so that Boston University finally reached "a point at which tenure standards were as demanding here as they are anywhere." Dr. Silber also noted that an award of tenure typically binds Boston University for a period of 40 years and involves a commitment of about $2,000,000 (C.A. App. 453-57, 475-76).

The determination of whether tenure should be granted, Dr. Silber testified, is "a very complex decision" that takes multiple factors into account, including a university's financial stability and its other needs. Accordingly, "[t]here is a presumption that tenure should not be awarded to any candidate;" and it is granted only when "there is overwhelming reason for doing so" (C.A. App. 462-64)).

[3] The Council does not mean to express any view as to the merits of the respondent's tenure candidacy; the point is that the record reflects that the case for mandated tenure for the respondent is, at best, mixed and ambiguous.

Indeed, the district court stated that there was "some dispute as to the quality of [the respondent's] scholarship." Cert. Pet. 68a. For example, although the respondent was unanimously recommended for tenure by the members of her department and by the College Appointments, Promotions, and Tenure ("APT") Committee, the vote of the University APT Committee, although supportive, was not unanimous. The latter Committee, as well as the College Dean, the University's Assistant Provost, and the University's Provost had some doubts about the respondent's scholarship. Further, an *ad hoc* Tenure Review Committee ("TRC"), composed of three impartial professors from outside Boston University, recommended that the respondent be tenured with one member dissenting and with all members expressing "reservations" about Brown's qualifications for tenure. See Cert. Pet. 3-7, 4a-9a.[4]

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[4] Again, Dr. Silber's testimony in this case is illustrative of the working of the tenure process at "mature" universities and the manner in which university presidents treat a tenure candidacy. Dr. Silber, who twice reviewed the respondent's tenure file, explained at trial how he reaches a decision concerning the grant of tenure, and why the "negatives" concerning the respondent influenced his decision to deny her tenure. To reach a tenure decision, Dr. Silber "feels personally obligated to review with care recommendations made by anyone who is asked for an opinion and to evaluate their assessments." In weighing the quality of a recommendation, Dr. Silber looks to the facts supporting it, to the background and competence of the person making it, and to the relationship of the person to the candidate. Accordingly, in order to achieve "as much objectivity as is possible," Dr. Silber does "not rely exhaustively or even primarily on the opinion of [a candidate's] immediate colleagues [because] a system of friendship or antipathy nearly always develops within a department," and thus the department may be "predisposed" for or against a candidate "without good justification" (C.A. App. 459-461).

When Dr. Silber reviewed the respondent's tenure candidacy the first time, he paid "a great deal of attention" to the reviews of her Austen book, especially the N.Y. Times review by Tony Tanner, whose criticism, Silber thought, "was very substantial," and to Pro-

Accordingly, it is clear that this is not a case where tenure has been denied on the basis of a record showing that the plaintiff's qualifications for tenure were undisputed. *Cf. Ford v. Nicks*, 741 F.2d 858, 864 (6th Cir. 1984); *Kunda v. Muhlenberg College*, 621 F.2d 532 (3rd Cir. 1980). Where there is such a dispute—and thus where there is clearly some basis for denying tenure on academic grounds irrespective of alleged sex discrimination—judicial awards of tenure intrude quite significantly on academic freedom and the parameters for such awards should be addressed by this Court.

C. Because of the vital role of education in our society and the nation's commitment to freedom of speech and academic freedom, the Court has noted that academic institutions possess certain "essential freedoms" under the First Amendment, including the freedom to determine for themselves, on academic grounds, who may teach at the institutions. *Regents of the University of California v. Bakke*, 438 U.S. 265, 312 (1978); *Keyishian v. Board of Regents of New York*, 385 U.S. 589, 603 (1967); *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring); *Widmar v. Vincent*, 454 U.S. 263, 279 n.2 (1985) (Stevens, J., concurring). Further, the Court has narrowed the power of the judiciary to overrule university decisions made on academic grounds:

> When judges are asked to review the substance of a genuinely academic decision . . . they should show

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fessor Tave's evaluation, which was "a very negative assessment" (C.A. App. 460, 470-72). He therefore regarded the three-year extension recommendations of the Dean and Provost as "ideal," because such an extension "would give a young, promising scholar an opportunity to demonstrate that level of maturity that had not yet been shown, and [he] was very hopeful that within another three years this candidate would clearly justify tenure" (C.A. App. 465-66, 473-76). After his second review, Dr. Silber concluded that the TRC evaluations confirmed his earlier view that the respondent should not be tenured at that time (C.A. App. 477-91).

> great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.

Regents of University of Michigan v. Ewing, 474 U.S. 214, 225 (1985) (where the Court rejected a substantive due process challenge to a state university's decision to dismiss a student).

Despite such pronouncements, the Court has not ruled squarely on the issue of whether a university's interest in determining who should be awarded tenure—i.e., "who may teach" at the university—may be undermined judicially even though there exists a genuine dispute as to the academic qualifications of a tenure candidate. Moreover, in the recent *University of Pennsylvania v. E.E.O.C.* case, —— U.S. ——, 107 L.Ed.2d 571 (1990), the Court recognized this issue, but expressly left it for a future decision: "We need not define today the precise contours of any academic-freedom right against governmental attempts to influence the content of academic speech through the selection of faculty. . . ." 107 L.Ed.2d at 587. Additionally, the Court also there repeated the cautionary statement in the earlier *Regents of University of Michigan v. Ewing* case, *supra*, that judges " 'should show great respect for the faculty's professional judgment,' " adding that "[n]othing we say today should be understood as a retreat from this principle of respect for *legitimate* academic decisionmaking." *Id* at 588 (emphasis in original).

In this posture of the law, this Court's resolution of the "judicial tenuring of professors" issue appears highly desirable. As we have stated in describing the Council's "Interest" in this case, the immediate resolution of this academic freedom issue would serve the interests of both the Council and its members.

CONCLUSION

For the foregoing reasons, the Writ of Certiorari should be granted.

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Dated: May, 1990

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REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

Respondent's argument that the decision below fails to raise any important or recurring issue of federal law (Opp. 6, 15, 21) is repudiated by the participation of the *amicus* supporting the respondent which represents "more than 40,000 college and university faculty members and research scholars," Brief of American Association of University Professors as *Amicus Curiae* in Opposition ("AAUP Opp.") at 2, and by the *amicus* supporting the petitioner which represents "more than 1500 colleges and universities." Brief of American Council on Education as *Amicus Curiae* in Support ("ACE in Supp.") at 1. It is simply impossible to reconcile respondent's assertion that this case "does [not] raise any issue of a pressing nature," (Opp. 6) with the appearance of the entire academic community at the certiorari stage.

Respondent's opposition implicitly concedes, in addition, that there is a conflict in the circuits on the first

issue presented, weakly insisting only that the conflict is not "clear." Opp. 6. At bottom, respondent's effort to recast the decision below as a simple "application of well-settled law to the particular facts of the case before it," (*id.*) cannot withstand scrutiny.[1]

I.

A. Both respondent and the AAUP *amicus* strain to diminish the conflict between the opinion below and the Sixth Circuit's opinion in *Gutzwiller* v. *Fenik*, 860 F.2d 1317 (6th Cir. 1988), by arguing simply that the decision below is limited to the facts presented and does not "state a general rule" to govern tenure cases. Opp. 5-6. Of course, given a similarly begrudging reading, the holding of virtually any case could be limited to its facts; taken to its logical conclusion, respondent's approach to

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[1] Respondent's continued mischaracterization of the strength of her tenure candidacy must be corrected at the outset. Contrary to her suggestion, this is not a case in which one "individual (the University President) . . . effected the discrimination." Opp. 11. Serious reservations regarding the quality of respondent's scholarship were raised by various individuals at almost every level of her tenure review, including the Dean of CLA, the Assistant University Provost, the University Provost, the University President, and finally all three members of the ad hoc Tenure Review Committee. Pet. 3-7. Moreover, the First Circuit ruled that the district court "probably" erred in excluding testimony offered by Boston University that would have demonstrated that members of the College APT Committee also had reservations about the quality of Brown's scholarship and believed "that progress on [a second book] was important." Pet. App. 20a. Indeed, as the American Council on Education concludes, "the record reflects that the case for mandated tenure for the respondent is, at best, mixed and ambiguous." ACE in Supp. 1 n.3.

Finally, respondent "dissimulates" when she suggests that "[i]f the president's vote were to be disregarded, the outcome would be a positive tenure award, based on the recommendation of the ad hoc committee," (Opp. 11-12) because she simply ignores the fact that the ad hoc TRC members were not directed to consider an extension of respondent's probationary period. C.A. App. 671, 756.

case law would completely eviscerate the value of precedent.[2]

Here, examination of the rationale of the decision below undermines entirely the respondent's efforts to minimize the First Circuit's holding. The court could not more clearly state its view that "once a University has been found to have impermissibly discriminated in making a tenure decision, as here, the University's prerogative to make tenure decisions must be subordinated to the goals embodied in Title VII." Pet. App. 48a. Thus, following the decision in this case, "an award of tenure is presumptively correct because '[a]warding [a successful Title VII complainant] tenure is the *only* way to provide her the most complete relief possible,'" consistent with the goals embodied in Title VII. Pet. 19 (quoting decision below, Pet. App. 49a (emphasis added)). Although the court below noted the argument that (consistent with the Sixth Circuit approach) the court should consider less restrictive alternatives to an award of lifetime tenure, the First Circuit flatly rejected any alternatives. Pet App. 49a.[3] Indeed, nothing in the court's opinion offers even the slightest hint that consideration of such alternatives *might ever* be appropriate. *Id.*

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[2] Despite the reliance by the respondent (Opp. 6, 9, 11) and the AAUP (AAUP Opp. 5, 8) on the "fact-dependent" nature of the First Circuit's rule, nothing to support this argument appears in the First Circuit's *opinion*. Additionally, notwithstanding the illusion created by the AAUP, (AAUP Opp. *passim*) its policy statements and reports are not widely accepted, objective standards for the academic community. See Furniss, *The Status of "AAUP Policy,"* 59 Educ. Rec. 7, 7-29 (1978).

[3] Contrary to the First Circuit's view, repeated in the AAUP amicus brief (AAUP Opp. 7 n.5), the University's offer of a three year extension to respondent was not itself found to be discriminatory. Pet. App. 49a. Instead, the jury answered only the following question affirmatively: "Do you find that the Trustees of Boston University refused to grant tenure to the plaintiff because of her sex?". C.A. App. 538.

Such an approach stands in stark contrast to the Sixth Circuit's approach in *Gutzwiller* and *Ford* v. *Nicks*, 866 F.2d 865 (6th Cir. 1989), *overruled on other grounds, Minority Employees of the Tennessee Dep't of Employment Security* v. *Tennessee*, No. 88-5429 (6th Cir. Apr. 26, 1990) (en banc) (effect of "et. al" in notice of appeal under Fed. R. App. P. 3 (c)). In both those cases, the Sixth Circuit affirmed the lower courts' findings that the colleges in question had discriminated against female faculty members in violation of Title VII.[4] The Sixth Circuit also recognized that a successful Title VII plaintiff generally should be made "whole for injuries suffered on account of unlawful employment discrimination." *Gutzwiller*, 860 F.2d at 1333; *Ford*, 866 F.2d at 875. Nevertheless, in *Gutzwiller* and *Ford*, the court adopted and then applied a rule that *mandates* the consideration of a less restrictive alternative to an immediate order of tenure in the university context.[5]

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[4] A careful comparison of the underlying facts in *Gutzwiller* with those presented here demonstrates a far greater similarity than respondent is willing to admit. First, both respondent here and plaintiff in *Gutzwiller* alleged that they were held to higher publishing standards than their male counterparts, a fact respondent apparently concedes. Opp. 10 n.6. In addition, Professor Gutzwiller complained, like respondent here, that various reviewers in her tenure deliberations unduly emphasized negative aspects of "what were generally favorable evaluations of Gutzwiller's scholarship." 860 F.2d at 1326. Finally, many outside evaluations of Professor Gutzwiller's work "*generously praise*[d her] published writing and assert[ed] that the work in progress . . . show[ed] the writer growing in critical sophistication [with] promise for her scholarly future." *Id.* (emphasis in original).

Despite acknowledging that this evidence supported a finding of sexual discrimination, *id.* at 1326-27, the Sixth Circuit (unlike the First Circuit here) nevertheless refused to order an award of reinstatement with tenure, declined to read into the record any finding that an unbiased reconsideration of tenure was impossible at the University, and remanded the case for consideration of a less restrictive alternative. *Id.* at 1333.

[5] *Gutzwiller*, 860 F.2d at 1333; *Ford*, 866 F.2d at 877. Respondent and its amicus misstate petitioner's argument before this Court. Petitioner contends that the Sixth Circuit's rule requiring con-

The Sixth Circuit, in contrast to the court below, reasoned that "[w]hile a few courts have indicated a willingness to award reinstatement with tenure . . . we believe that such relief will, in most cases, entangle the courts in matters best left to academic professionals." *Gutzwiller*, 860 F.2d at 1333; *Ford*, 866 F.2d at 877.[6] The court therefore held that reinstatement with tenure should be awarded in "only the most exceptional cases" when a reviewing "court is convinced that a plaintiff reinstated to her former faculty position could not receive fair reconsideration (*i.e.*, consideration without the taint of discrimination)" and remanded the case for consideration of less restrictive alternatives.[7] Thus, if this case had arisen in the Sixth Circuit, instead of the First Circuit, the district court's order of an "automatic"

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sideration of a less restrictive alternative, *i.e.*, an unbiased tenure decision is an appropriate accommodation of the government's legitimate Title VII interest and a University's first amendment protected right to determine *on academic grounds* "who may teach."

[6] Respondent's attempt to suggest that "any tenure case which survives the [First Circuit's] review is exceptional, since the court of appeals' requirements for a finding of *liability* in a tenure challenge [are] so demanding" is completely gratuitous. Opp. 8 (emphasis added). Respondent simply can provide no support for their *suggestion* that the standard for Title VII liability in the Sixth Circuit differs from the prevailing standard in the First Circuit.

[7] 860 F.2d at 1333; 866 F.2d at 877. Respondent's suggestion that consideration of a less restrictive alternative here "would serve no purpose" (Opp. 12) misperceives the Sixth Circuit's ruling in *Gutzwiller*. First, there has been no finding by the lower court that an unbiased consideration of respondent's case would be impossible. At the very minimum, petitioner would be entitled to a separate hearing on that issue under the Sixth Circuit's rule. Second, there has been no showing that the relevant decisionmakers at the University would be the same. For example, and contrary to respondent's suggestion, (Opp. 11) President Silber is on leave from the University. The current *president ad interim*, Jon Westling, took no part in the decision to deny respondent tenure.

award of tenure would have been reversed.[8] In light of this clear conflict in the circuits, the Court should grant the petition to restore uniformity on this important issue of federal law.

B. Notwithstanding respondent's representations to the contrary, the order below granting reinstatement with tenure represents a "*direct* infringement on the [University's] asserted right to 'determine for itself on academic grounds who may teach.'" *University of Pennsylvania* v. *E.E.O.C.*, 110 S.Ct. 577, 587 (1990) (emphasis in original) (citation omitted). At bottom, the flaw with the First Circuit's approach is that it fails to accord sufficient deference to the University's "independent judgment in choosing faculty," Pet. 23 n.17, and permits the court or jury to "*substitute* its teaching employment criteria for those already in place at the academic institutions, [thereby] directly and completely usurping the discretion of [the] institution." *University of Pennsylvania*, 110 S.Ct. at 587 (emphasis in original).

As the American Council on Education notes in its brief in support of the petition, the danger from the usurpation of a University's tenure decisionmaking is no small matter: because the "very essence" of a University "depends upon the quality of its faculty—especially its tenured faculty," its tenure decisionmakers have "the ultimate responsibility for a university's continuance as a viable educational entity and as a contributor to the betterment of the society in which it exists." ACE in

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[8] Both respondent and its supporting *amicus* virtually ignore the Sixth Circuit's holding in *Ford* reversing an award of reinstatement with tenure. 866 F.2d at 877. In *Ford*, the Sixth Circuit affirmed the district court's finding that the University's proffered justifications for failing to re-hire plaintiff were pretextual—concluding that the University's concepts of teaching "'specialties' and . . . the qualifications necessary to teach them" were stretched "to come up with a post hoc rationalization of its position." *Id.* at 871-72. Even this evidence was insufficient, however, to justify the trial court's award of lifetime tenure. *Id.* at 877.

Supp. at 3-4. In light of this Court's longstanding recognition of "the crucial role universities play in the dissemination of ideas in our society," *University of Pennsylvania*, 110 S.Ct. at 585, the petition for certiorari should be granted.

II.

In response to the question presented regarding the proper standard for "harmless error" review of a constitutional error, respondent first makes the remarkable argument that review of this issue was waived because it "was [not] presented to or decided by the district court or the court of appeals." Opp. 18-19 (citing Petitioner's Motion for Judgment Notwithstanding the Verdict, reproduced as Appendix A to Opp.). But an issue of "harmless error" review is, by definition, an issue of appellate decisionmaking, which is not even ripe until after the court of appeals has issued its opinion. Certainly, petitioner could not reasonably foresee that the First Circuit would excuse *five* separate evidentiary errors—two of which were constitutional errors—as "harmless." See Pet. 14 n.12. Thus, the suggestion of waiver merely reveals respondent's obvious recognition of the importance of the legal issue decided by the opinion below.

Second, respondent argues that the admission of evidence relating to the President's scholarship or the Dean's curriculum decisions in question did not infringe upon or otherwise chill academic speech. Opp. 19-20. That is simply wrong. With respect to respondent's distortion of the President's scholarly speech as evidence of his "sexist" attitudes, the First Circuit stated:

> We fear, moreover, the chilling effect that admission of such remarks could have on academic freedom. Use of such evidence . . . could cause a university president, dean or teacher to avoid topics of this kind altogether for fear that one or two sentences might later be used as evidence of alleged discriminatory animus.

Pet. App. 27a. Of course, the First Circuit's "fear"—that scholarly commentary might be chilled by evidentiary abuse—was realized in this case and the court therefore concluded that "it was error to admit these remarks."

The First Circuit's conclusion with respect to evidence of the Dean's curiculum decisions was even more blunt:

> A dean should not have to fear that he cannot express his opinion as to the *quality* of a particular studies program without this criticism being brought forward as evidence of sexism.

Pet. App. 29a (emphasis in original). The admission of this evidence was erroneous because of its complete lack of relevance and "because of its effect on free speech in a university." *Id.* Thus, respondent's statement that the court of appeals expressed only a "prudential" or "abstract" concern for First Amendment issues (Opp. 20) ignores the plain findings of infringement. The First Circuit's "only" error was in allowing the infringement to go unremedied.

Finally, respondent argues that the question of whether the "beyond a reasonable doubt" standard should be applied to "constitutional errors in civil cases is not a serious and important issue demanding this Court's review by certiorari." Opp. 21. However, this Court has specifically noted the existence of the issue and the fact that (at least for this Court) it was an open question. See Pet. 25. At least three circuits have split on the issue of whether there should be different standards of harmless error in civil and criminal cases (see *id.*) and the issue has been repeatedly addressed by the most respected commentators on evidence and civil procedure. *Id.* Most important, if petitioner is correct that the heightened standard of *Chapman* v. *California*, 386 U.S. 18, 21 (1967), is applicable in the civil context, then the decision below clearly is incorrect and in conflict with *Chapman*.

Thus, the question is more than just "an interesting intellectual proposition" (Opp. 21); it is a question of substantial and recurring importance to persons in the academic community who are now subject to liability based, at least in part, on the evidentiary misuse of their academic publications and decisions. The decision below, shielding such misuse from meaningful review by means of a limited "harmless error" analysis, presents an important question of federal law which should be addressed by this Court.

CONCLUSION

For the reasons set forth above and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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